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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MICHAEL A. BELLETIRE, Director, Department of Mental Health and Developmental Disabilities; WALTER W. NAUMER, Chairman, Illinois State Board of Education; WILLIAM L. KEMPINERS, Director, Department of Public Health; GREGORY L. COLER, Director, Department of Public Aid; GORDON JOHNSON, Director, Department of Children and Family Services; ROBERT W. GRANZEIER, Director, Department of Rehabilitation Services; DONALD G. GILL, State Superintendent of Education,

Petitioners,

vs.

RICHARD PARKS, MARILYN PARKS, and LESTER PARKS, by his parents and next friends, RICHARD PARKS and MARILYN PARKS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the decision of the United States Court of Appeals for the Seventh Circuit improperly requiring Illinois to pay the full cost of room and board for all handicapped children in private residential placements conflicts with decisions in other federal courts regarding the appropriate standard to be applied in deciding whether a residential placement is educational under the Education for the Handicapped Act.

2. Whether the Seventh Circuit's decision conflicts with this Court's decision in *Rowley* in that it requires the State to maximize the potential of handicapped children because the State is obligated to provide room and board at no expense whenever the State decides that a handicapped child should be in a residential placement, without regard to whether the placement was made in order to enable the child to benefit from his special education and related services.

PARTIES

All Parties to this Petition are reflected in the caption of the case. Pursuant to Supreme Court Rule 48, public officials who have left State service have been deleted and their successors in office have been substituted. The public officials who are petitioning this Court are all officials of the State of Illinois and they shall be referred to collectively in this Petition as the "State defendants."

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was entered on February 5, 1985 and has not yet been reported. It is reprinted herein as Appendix A. The opinion of the United States District Court for the Northern District of Illinois is reported at 557 F. Supp. 1280. It is reprinted herein as Appendix B.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on February 5, 1985. No petition for rehearing was filed. This petition for a Writ of Certiorari is timely filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS

(The text of these provisions are reprinted herein as Appendix D).

Federal Laws

U.S. Const., art. VI, § 2;
20 U.S.C. § 1400, 84 Stat. 175;
20 U.S.C. § 1401, 97 Stat. 1357, 1358;
20 U.S.C. § 1415(a);
45 C.F.R. § 121a.302 (1980);
34 C.F.R. § 300.302 (1981);
34 C.F.R. § 300.531 (1982);
34 C.F.R. § 300.343(c) (1982).

State Laws

Ill. Rev. Stat. 1983, ch. 91½, ¶ 5.105;
Ill. Rev. Stat. 1983, ch. 91½, ¶ 5.116;
59 Ill. Admin. Code, § 106.25;
59 Ill. Admin. Code, § 106.85.

STATEMENT OF THE CASE

The Federal Law:

The Education of the Handicapped Act of 1975 ("EHA"), 20 U.S.C. §§ 1400 *et seq.*, requires the State to maintain "a policy that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1) (1976). Such an education must include both "special education" and "related services." 20 U.S.C. § 1401(18) (1976). The EHA defines "special education" to be

> specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction and instruction in hospitals and institutions.

20 U.S.C. § 1401(16) (1976). The term "related services" includes

> transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services . . .) as may be required to assist a handicapped child to benefit from special education . . . .

20 U.S.C. § 1401(17) (1976). With respect to the residential placement of a handicapped child, the regulations which were promulgated to enforce the EHA provide that if placement in a residential program "is necessary to provide the special education and related services to a handicapped child," then the cost of the placement, including room and board, "must be at no cost to the parents of the child." 45 C.F.R. § 121a.302 (1980). *See also* 34 C.F.R. § 300.302 (1981).

The State Law:

Sections 5-105, 5-106, and 5-116 of the Illinois Mental Health Code, Ill. Rev. Stat. 1983, ch. 91½, provide generally that recipients of mental health services from the Illinois Department of Mental Health and Developmental Disabilities ("DMHDD"), or their "responsible relatives," are required to reimburse the State for such services at specified rates. When this suit was brought in 1982, the maximum which could be charged as "responsible relative liability" to the parents of a handicapped child placed in a private (i.e. non-State run) residential facility was $100 per month. State law has since been amended and under the current law, such charges are determined on a sliding scale based generally on adjusted gross income and the number in the family. *See* 59 Ill. Admin. Code § 106.85 (1984). For example, with family income of $24,000 annually, a family of two would pay $170 per month for such services, while the same size family would pay $430 per month with annual income of $50,000.

The Litigation—State Court:

In *Parks v. Illinois Department of Mental Health and Developmental Disabilities*, 110 Ill. App. 3d 184, 441 N.E. 2d 1209 (1982), the parents of Lester Parks, a handicapped child, filed an action to review the determination of DMHDD that they were required to pay $100 per month as "responsible relative liability" under State law (Ill. Rev. Stat. 1979, ch. 91½, ¶ 5-105) to contribute towards Lester's room and board expense at a private residential school. Lester's parents argued that such charges were invalid under the EHA. The Illinois Appellate Court, First District summarized the ruling of the Circuit Court:

> . . . the trial court concluded as a matter of law that where residential placement was necessary for the education of the handicapped child, it was a violation of Federal law . . . to assess the responsible relative liability charge against the parents. The trial court further held Federal law required defendant to pay the costs of 'all placements that are educationally necessary,' not only those placements that are 'solely for [an] educational purpose.' * * *

441 N.E.2d at 1213. The Appellate Court agreed with the conclusions of the trial court and held, as a matter of law, that the State statute authorizing such charges was preempted by the EHA to the extent that it authorized the collection of responsible relative liability amounts from the parents of handicapped children who were residentially placed in private schools for educational reasons. Since it was undisputed that Lester was placed in a residential school for educational reasons, "the imposition of the responsible relative liability charge by defendant cannot stand in view of the express language of the Federal statutes and regulations." 441 N.E.2d at 1211.

The District Court:

On February 22, 1982 plaintiffs filed a complaint under 42 U.S.C. § 1983 in the District Court for the Northern District of Illinois against various State officials ("State defendants"). Jurisdiction for this action was based upon 28 U.S.C. §§ 1331, 1343. The only plaintiffs named in this action were Lester Parks and his parents. This suit was filed as a class action for declaratory and injunctive relief on behalf of all handicapped Illinois children whose families had been charged responsible relative liability amounts under State law for placements in private residential facilities (i.e. "private special education placements"). (Doc. 1).

On March 1, 1983 plaintiffs' motions for class certification and partial summary judgment were granted. The District Court held that defendants' policies of charging responsible relative liability amounts violated federal law. (Doc. 84). Defendants filed a Motion for Clarification of the Class on April 25, 1983 in which they proposed a definition of the term "private special education placements" which the District Court had not defined in its prior order. In this motion, DMHDD asserted:

> DMHDD has approximately 1200 recipients in various private settings subject to the family liability assessment. It cannot . . . be assumed that each of these placements was made as a necessary means to provide special education and related services and is a private special education placement.

(Doc. 97). The State defendants explained that the decision of whether or not a particular placement was "educational" or "non-educational" could not be made as a matter of law but:

> [a] review must be made of each IEP [Individual Education Program] . . . in order to determine whether . . . placement in a residential setting was necessary to provide the special education and related services required by the IEP.

Ibid. Defendants proposed that the term "private special education placement" be defined as:

> Placement by a local education agency of a handicapped child in a private school or residential facility pursuant to a finding that the placement is necessary to provide the special education and related services for the child as identified in the Individual Education Program.

Ibid.

On May 23, 1983 the District Court entered a partial final judgment. In this judgment the District Court ruled that "[d]efendants are permanently enjoined from engaging in defendants' policies and practices regarding responsible relative liability, and are specifically prohibited from leaving unpaid the responsible relative liability amounts of handicapped Illinois children between the ages of three and twenty-one who are in private special education placements, or charging or attempting to charge parents of such children any responsible relative liability amounts." (Doc. 103). In this judgment order the District Court adopted the State defendants' suggested definition and defined the term "private special education placements" as

> placement of a handicapped child in a private program or other arrangement that provides services (including services such as room and board) to a child who receives special education and related services pursuant to a finding in the Individual Education Program that the placement is necessary to provide the special education and related services for the child.

Ibid. On June 1, 1983 the plaintiffs filed a Motion to Alter or Amend the Partial Final Judgment. (Doc. 105). In this motion, the plaintiffs argued that no explicit statement would be found in an IEP indicating that the particular placement was made for educational reasons; at best, such a finding would be implicit in the IEP.[1] Further,

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[1] The IEP contains the specific instructional goals for the child. However, as pointed out by the plaintiffs in this motion, it will not expressly state the reasons for the placement decision. This decision is made at the multidisciplinary conference (see footnote 2, *infra*, for a discussion of this conference), and State law clearly contemplates that some children will be placed in residential facilities for non-educational reasons. *See, e.g.*, State Bd. of Ed. Rule 8.03 "* * * When residential placement is contemplated for children for reasons primarily other than education, one or more representatives of the appropriate state agencies shall be invited to attend the multidisciplinary conference."

> . . . to the extent that such findings are implicit, determination of who is a class member, under the existing order, is likely to necessitate individual determinations by the court of what each IEP meant.

Ibid. To avoid such "individual determinations," plaintiffs proposed the following definition, eliminating the restriction that the placement must have been "necessary to provide the special education for the child":

> "Private special education placement" means placement of a handicapped child in a private program or other arrangement that provides services (including services such as room and board) to a child who receives special education *or* related services *pursuant to an Individual Education Program which provides for the placement.* (Emphasized portion indicates amendment, emphasis in original).

Ibid.

Defendants objected to this alteration because "[t]he change proposed [by plaintiffs] eliminates the very principle on which basis 94-142 [the EHA] contemplates that placements will be made, i.e., as a means necessary to provide special education and related services to the child." (Doc. 107). Defendants also argued:

> Plaintiffs' stated concern about the court's definition indicates a reading of the language which places form over substance; the definition is a statement of principle by which the placement of each child will be judged and consequently the child either included or excluded from the class.
>
> To the extent the court's definition requires that each child's placement and IEP be looked at individually, the definition is simply giving effect to the mandate of 94-142; the essence of 94-142 is that the individual child be the focus and that the provision

> of an education to that child is what governs which services may be required. *Board of Education v. Rowley*, ____ U.S. ____, 102 S. Ct. 3034 (1982).

The District Court entered an Amended Decree of Injunction and Partial Final Order on June 24, 1983. (Doc. 112). In this order, the Court adopted plaintiffs' proposed definition of the term "private special education placement," and ruled, as a matter of law, that the defendants could not charge any class member responsible relative liability amounts as contributions towards the room and board expenses of private residential placements.

Seventh Circuit Court Of Appeals:

The State defendants appealed the District Court's decision under 28 U.S.C. § 1291. On appeal, the State defendants argued at length that the District Court erred in ruling as a matter of law that responsible relative liability amounts could never be charged; they contended that such amounts could be properly charged when handicapped children were residentially placed for non-educational reasons:

> The question of whether the State may impose the responsible relative liability would turn upon the facts in each case. Where the individual placement was made for educational purposes, then no charges may be assessed. On the other hand, where the placement was made for non-educational reasons, then the assessment of this liability would be proper.

State defendants' reply brief at 5. In resolving the question of whether placements were educational, the State defendants urged the Court to consider not only the IEP's, but also all of the other facts which would shed light on the type of placement which was made in each

individual case, such as the report from the multidisciplinary staffing conference.[2] "It is quite clear under State law that residential placement decisions would only be made in a multidisciplinary conference and the staff report emanating from that conference would explain the reason or reasons for the decision which was made." State defendants' reply at 13. Since every child must have an IEP (34 C.F.R. § 300.343(c) (1982)), and since the IEP is only developed after the placement decision has already been made (defendants' reply at 13-14), the State defendants argued that

> that document cannot be utilized as the sole guide to ascertain the motivation for the placement decision. Therefore, unless the court examines the other relevant documents concerning each placement made by DMHDD, it cannot determine whether the placement was made for educational or non-educational reasons. The District Court plainly erred in this case when it adopted the definition of "special education placements" suggested by plaintiffs. The result of that error is that every handicapped child in Illinois who is residentially placed [in a private institution] now receives free room and board irrespective of whether the placement was made primarily for medical, social, or educational reasons. This result is far beyond the proper scope of the EAHCA, which only requires that room and board be provided free when necessary in order to enable the child to benefit from his education.

State defendants' reply at 14-15. The defendants urged the Court of Appeals to remand the case to the District

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[2] A preplacement evaluation is required before any action may be taken regarding the initial placement of a handicapped child. 34 C.F.R. § 300.531 (1982). Such an evaluation is also required under Illinois law. *See* Ill. Rev. Stat. 1983, ch. 122, § 14-822(b).

Court for an examination of the facts surrounding each placement to resolve the question of whether a charge for room and board could be made under State law.

> Contrary to plaintiffs' assertion, none of the decisions which they cited held that *all* residential placements are educational under the EAHCA. In each case the court examined the facts to determine the motivation for the particular placement involved. Next, the court analyzed the situation to ascertain whether that placement was necessary in order to enable the child to benefit from a program of special education. In contrast, in the instant case the Court has not even considered the facts surrounding the 1,200 residential placements made by DMHDD to determine whether any of them were made for non-educational reasons.
>
> Even under the rationale of the cases cited by the plaintiffs, it was error for the District Court in this case to rule as a matter of law that all residential placements of handicapped children must be made free of charge because all such placements are educational. For this reason, the decision of the District Court must be reversed and the case remanded for further consideration.

State defendants' reply brief at 12-13. The Seventh Circuit Court of Appeals ignored this argument and affirmed the District Court's decision that as a matter of law the State defendants could not charge responsible relative liability amounts to the parents of any handicapped Illinois children who are educable (i.e. are not comatose).

On Remand To The District Court:

On March 20, 1985 a draft notice for the parents and guardians of handicapped children was entered in the District Court on remand from the Seventh Circuit's decision. This notice, which has not yet been sent pending this appeal, states:

Records of the state of Illinois show that you are the parent(s) or guardian(s) of a handicapped child in a private special education program. In the past, the state has not paid the entire cost of private special education but instead has either required the parents or guardians to pay part of the cost or has simply left part of the cost unpaid. In 1982, this lawsuit was filed challenging this practice. * * * On June 24, 1983, Judge Prentice Marshall of the United States District Court ruled that the state was violating federal law. Judge Marshall ordered the state to begin paying the cost of private special education for handicapped children which it had not been paying. This cost is called "responsible relative liability."

The State of Illinois appealed Judge Marshall's ruling. On February 5, 1985, the United States Court of Appeals decided that the State of Illinois had to pay the responsible relative liability amounts for private special education for handicapped children. This ruling covers only those children who have been placed in private special education programs. If this applies to your child, you need no longer pay the annual assessment which the state Department of Mental Health and Developmental Disabilities ("DMHDD") had previously required you to pay for your child's private educational placement. * * *

REASONS FOR ALLOWING THE WRIT

Introduction

The pivotal question posed by this case is whether the Seventh Circuit erroneously affirmed the order of the District Court requiring the State of Illinois to pay the room and board expense for *all*[3] handicapped children in Illinois between the ages of three and twenty-one who are in private residential placements. The State submits that this result is improper and review by this Court is warranted for two reasons:

I.

THE UNPRECEDENTED DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS REQUIRING ILLINOIS TO PAY THE FULL COST OF ROOM AND BOARD FOR ALL HANDICAPPED CHILDREN IN PRIVATE RESIDENTIAL PLACEMENTS IS ERRONEOUS AND CREATES A CONFLICT IN THE CIRCUITS REGARDING THE APPROPRIATE STANDARD TO BE UTILIZED IN DECIDING WHETHER A RESIDENTIAL PLACEMENT IS EDUCATIONAL UNDER THE EHA.

In every other federal court which has evaluated this question, the courts have viewed the educational versus non-educational placement question as a factual issue which can properly be resolved only by examining the particular facts surrounding the placement decision. Two general legal standards have been adopted by other federal courts confronted with this problem to evaluate residential placements in order to determine if such placements were covered by the EHA. Residential placements have

[3] Excluding only non-educable (i.e. comatose) children.

been held to be required by the EHA when such placements were either:

A. necessary to provide a free appropriate education

See: *Papacoda v. State of Connecticut*, 528 F. Supp. 68, 71 (D. Conn. 1981) ("placement was necessary in order for the child to learn."); *North v. Dist. of Columbia Bd. of Education*, 471 F. Supp. 136, 139 (D.D.C. 1979) ("plaintiff [had] severe emotional and educational problems which [could] appropriately be dealt with only by intensive treatment in a residential setting."); or

B. made for interdependent, non-segregable educational and non-educational reasons

See: *Kruelle v. New Castle County School District*, 642 F.2d 687, 694 (3d Cir. 1981) ("the unseverability of such [social, emotional, medical, and educational] needs is the very basis for holding that the services are a prerequisite for learning.").

In each case, the courts have focused on the facts surrounding the particular placement to determine whether it was educational or non-educational.[4] The State defendants urged the Seventh Circuit to adopt these standards and reverse the District Court's decision because that court never examined the facts surrounding any of the residential placements made by DMHDD to determine

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[4] Various commentators have also discussed the question of how to determine whether a particular placement was educational or non-educational under the EHA. See, e.g., Stark, *Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. 94-142*, 14 Conn. L. Rev. 477, 514-16 (1982); Mooney & Aronson, *Solomon Revisited: Separating Educational and Other Than Educational Needs in Special Education Residential Placements*, 14 Conn. L. Rev. 531, 551-56 (1982).

whether they were educational or non-educational. The only limitation adopted by the District Court—that the residential placement must have been reflected in the IEP before the State would be required to pay for it—was a meaningless one, since this was true in every case where a child was residentially placed. The effect of the District Court's decision, then, was to require the State to pay the full room and board expense for every private residential placement of a handicapped child in Illinois. The State defendants argued that this decision was erroneously overbroad because room and board would only be a related service under the EHA where the residential placement was made solely or primarily for educational reasons. In the instant case, however, the Seventh Circuit ruled that *all* private residential placements of handicapped children in Illinois are educational and so room and board is always a related service under the EHA which the State must provide at no cost to the parents of such children. This decision was erroneous.

It is undisputed that all educable handicapped children must be educated wherever they are placed. However, it does not follow that since education will be a component of every placement, then every placement is educational. While the distinction between educational and non-educational placements is a difficult one, the State of Illinois agrees with the general tests which have been utilized by federal courts in other jurisdictions in order to resolve the issue of whether room and board expense is a related service under the EHA. Illinois believes that the appropriate standard under which each residential placement decision must be evaluated should be:

"educational placement"	*"non-educational placement"*
1) solely for educational reasons	1) solely for social reasons
2) primarily for educational reasons	2) solely for medical reasons
3) for educational/non-educational reasons which cannot be separated	3) solely for psychological reasons
	4) primarily for any of above reasons which can be separated from educational needs.

It is never appropriate to rule, as the Seventh Circuit did in this case, that whenever a child who can be educated is placed in a private residential institution, then that placement is educational and the room and board expense is a related service under the EHA.

The State of Illinois agrees with the legal standard adopted by the Third Circuit in *Kruelle* and urges this Court to note probable jurisdiction in this case and hold that room and board is only a related service under the EHA when it has been established that the placement was made for educational purposes.

II.

THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISION IN *BOARD OF EDUCATION v. ROWLEY* BY REQUIRING THE STATE TO MAXIMIZE THE POTENTIAL OF HANDICAPPED CHILDREN IN THAT IT REQUIRES THE STATE TO PROVIDE ROOM AND BOARD AT NO EXPENSE WHENEVER THE STATE DECIDES THAT A HANDICAPPED CHILD SHOULD BE IN A RESIDENTIAL PLACEMENT, WITHOUT REGARD TO WHETHER THE PLACEMENT WAS MADE IN ORDER TO ENABLE THE CHILD TO BENEFIT FROM HIS SPECIAL EDUCATION AND OTHER RELATED SERVICES.

In *Board of Education etc. v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034 (1982), this Court examined the EHA and held that under this law "Congress did not impose upon the States any greater substantive educational standard than would be necessary to make access [to special education] meaningful." 103 S. Ct. at 3043. The intent of the EHA "was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Ibid.* Therefore, it is not necessary for the states to furnish to such children free of charge every special service necessary "to maximize each handicapped child's potential." 102 S. Ct. at 3047. In *Parks v. Illinois Dept. of Mental Health and Developmental Disabilities, supra*, the Illinois Appellate Court found that the State law authorizing DMHDD to charge responsible relative liability was preempted by the EHA to the extent that the residential placement was an educational one. The State court decision in *Parks* left the State free to make such charges where the residential placement decision was made for non-educational reasons. However, the Seventh Circuit in this case has precluded the State from ever making such charges, thus implicitly invalidating the Illinois law authorizing responsi-

ble relative liability charges with respect to handicapped children.

This decision intrudes on the sovereign powers of the State of Illinois and directly conflicts with this Court's ruling in *Rowley*. In *Rowley* this Court held that a state participating in the program established by the EHA was not obliged to provide every educational service which would benefit a handicapped child. The states are required to provide a free appropriate education, but no particular level of service is mandated. In the instant case, however, the Court has required the State to pay for residential placements which have not even been shown to be directly related to education. If the EHA does not require the states to provide optional educational benefits, it clearly does not require the states to provide non-educational social services.

In the exercise of its police power, the State of Illinois has determined that it will provide certain social services to its citizens and will subsidize these services to a certain degree. Therefore, when a child needs to be placed in a residential facility (e.g., mental hospital, skilled pediatric center, residential school, etc.), for whatever reason, the State will pay a portion of the cost, including the room and board expenses, but it will require the child's "responsible relatives" to reimburse it for a portion of the room and board expense. Ill. Rev. Stat. 1983, ch. 91½, ¶ 5-105. Such responsible relative liability is collected from parents regardless of whether the child has been placed in a State institution[5] or in a private facility.

[5] No member of the plaintiffs' class in this case was residentially placed in a public (State-run) facility, so such placements are not at issue in this case. DMHDD is continuing to charge responsible relative liability amounts to parents of children in State

(Footnote continued on following page)

The State of Illinois, in the exercise of its police power, has every right to exercise its discretion to determine how to allocate its limited resources for social welfare programs to best serve the needs of all of its citizens. Where a State agency places a handicapped child in a private residential facility for non-educational reasons the State's responsible relative liability law does not conflict with the EHA and the federal courts should not interfere with the State's determination to recoup a portion of the room and board expenses for such placements. The EHA was not intended to place the parents of handicapped children in a favored position, yet that was the effect of the Court's decision in this case. Under Illinois law, "financial aid and social welfare services . . . supplement rather than supplant the primary and continuing obligation of the family unit for self-support to the fullest extent permitted by the resources available to it." Ill. Rev. Stat. 1983, ch. 23, ¶ 10-1. Where handicapped children are placed in a residential facility, the State has the right to require their parents to pay for a portion of the cost of room and board. The decision of the Seventh Circuit in this case precludes such charges. This result goes far beyond the proper scope of the EHA and implicitly holds that a valid State law is preempted by federal law. As the State's responsible relative liability law has been construed by the State Appellate Court in *Parks*, that law is a proper exercise of the State's police powers which is not preempted by the EHA.

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[5] *continued*
residential facilities where it believes that such charges are proper. However, pursuant to the Court's order in this case, the State makes no charge for any child in a private residential facility, regardless of the reason for the placement decision.

The decision of the Seventh Circuit Court of Appeals in the instant case impermissibly interferes with Illinois' exercise of its sovereign prerogatives by requiring the State to "maximize" the potential of every handicapped child by providing free room and board without regard to whether the residential placement was necessary for educational reasons. This decision is directly contrary to this Court's interpretation of the requirements of the EHA in *Rowley* and it should be summarily reversed.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that this Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 83-2391, 83-2448, 83-2567

RICHARD PARKS, MARILYN PARKS, and LESTER PARKS by his parents and next friends, RICHARD PARKS and MARILYN PARKS; on their own behalf, and on behalf of all others similarly situated,

Plaintiffs-Appellees,

v.

IVAN PAVKOVIC, Director, Department of Mental Health and Developmental Disabilities, et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 82 C 0965—Prentice H. Marshall, *Judge.*

ARGUED OCTOBER 1, 1984—DECIDED FEBRUARY 5, 1985

BEFORE CUMMINGS, *Chief Judge*, and BAUER and POSNER, *Circuit Judges.*

POSNER, *Circuit Judge.* This is a class action by handicapped children and their parents, under the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1400 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, against the directors of various Illinois state agencies. The state—as we shall refer to the defendants collectively, because they are sued in their official capacities—appeals from the district judge's grant

of injunctive and monetary relief to the class represented by the plaintiffs named in the complaint (Lester Parks and his parents).

Lester Parks is now 19 years old, but because of various (nonphysical) afflictions such as autism and mental retardation, he functions on the level of a 3-6 year old. He is indisputably a handicapped child within the meaning of the Education for All Handicapped Children Act, which requires participating states such as Illinois to offer all handicapped children between the ages of 3 and 21 (with immaterial exceptions) "a free appropriate public education." 20 U.S.C. § 1412(1); see generally *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). The term includes both "special education and related services," 20 U.S.C. § 1401(18), the former meaning "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including ... instruction in hospitals and institutions," § 1401(16); the latter meaning "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education," § 1401(17).

In 1980 Lester was in a private institution called New Hope Living and Learning Center. The state reimbursed his parents for all of the instructional and living expenses charged by New Hope except for $100 of his monthly living expenses. (We shall use the term "living expenses" to denote room and board, clothing, and other such noninstructional expenses, whether incurred in private residential institutions or private day schools.) The state defends the deduction on the ground that it had placed Lester in New Hope not because he had special educational needs but because he had a "developmental disability," meaning "a disability which is attributable to: (a) mental retardation, cerebral palsy, epilepsy or autism; or to (b)

any other condition which results in impairment similar to that caused by mental retardation and which requires services similar to those required by mentally retarded persons." Ill. Rev. Stat. 1981, ch. 91 1/2, ¶ 1-106. Illinois law requires the parents of a child who is placed in a private facility to pay a maximum of $100 a month toward the costs of the facility (the maximum is not reached until the family has an annual income of $15,600) if the child was placed there pursuant to a determination by the state that he required such placement because he was developmentally disabled rather than because he needed a special education within the meaning of the Education for All Handicapped Children Act. See Ill Rev. Stat. 1981, ch. 91 1/2, ¶ 5-116; Ill. Admin. Code, ch. I, § 226.420(c).

Lester's parents complained to the responsible state agency, and on appeal to the Illinois state courts won a judgment requiring the state to pay New Hope's bills in full. See *Parks v. Illinois Dept. of Mental Health & Developmental Disabilities*, 110 Ill. App. 3d 184, 441 N.E.2d 1209 (1982). That litigation finally ended on February 1, 1983, when the Illinois Supreme Court denied the state leave to appeal. Meanwhile Lester had been moved in 1980 to another private institution, Willowglen Academy, and again his parents were required to pay $100 a month toward his living expenses and again they complained to the state agency. A hearing officer ordered the state to pay Willowglen's future bills in full but did not order it to reimburse the Parkses for their unpaid Willowglen bills, which had mounted up above $2,000. The Parkses appealed the hearing officer's decision to the next level of administrative review. When the appeal was not decided within the time required by federal law, the Parkses, having thus exhausted their administrative remedies, and facing a discharge notice from Willowglen, brought this suit in federal district court early in 1982 under 20 U.S.C. § 1415(e)(2). This section of the Education for All Handicapped Children Act authorizes anyone aggrieved by a

decision made by a state in administering the Act to bring a civil action in state or federal court after exhausting his state administrative remedies, and directs the court to "grant such relief as the court determines is appropriate." The complaint alleged that the state was violating both the Education for All Handicapped Children Act and section 504 of the Rehabilitation Act by refusing to pay for Lester's living expenses. The complaint asked for a preliminary injunction ordering the state to pay the accumulated bill from Willowglen so that Lester would not be expelled before trial, and a permanent injunction forbidding the state to deduct any part of Lester's living expenses in the future (till he reaches 21).

The district court granted the preliminary injunction in March 1982, 536 F. Supp. 296, 313 (N.D. Ill. 1982), and the state complied with the injunction. In February 1983 the district court certified the Parkses' suit as a class action on behalf of all handicapped children (apparently some 600 in all) whose living expenses (up to $100 a month) the state requires the parents to pay on the ground that the children have been institutionalized because they are developmentally disabled rather than because they need special education. 557 F. Supp. 1280 (N.D. Ill. 1983). A few months later the court permanently enjoined the state from requiring such payments and also entered a purported final judgment under Rule 54(b) of the Federal Rules of Civil Procedure ordering the state to reimburse the class members for living expenses that the state had refused to defray since 1978, when the pertinent provisions of the Education for All Handicapped Children Act took effect. The court did not compute the amount of reimbursement due; we were told at argument that the total is between $1.5 million and $3 million.

The state appeals from both the permanent injunction and the order regarding reimbursement. We must first decide whether we have appellate jurisdiction. We shall begin with the order to reimburse living expenses; as will appear, the appealability of the permanent injunction is not problematic, even if that injunction is not itself a final order.

A district judge does not have carte blanche to certify an order for an immediate appeal under Rule 54(b). The order must finally dispose of a separate claim or a separate party. Normally an order that merely decides liability and leaves the determination of damages to future proceedings does not finally dispose of any claim; it is just a preliminary ruling on the plaintiff's damage claim. E.g., *Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976); *Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs*, 721 F.2d 629, 630 (7th Cir. 1983); *Weiss v. York Hospital*, 745 F.2d 786, 802-03 (3d Cir. 1984); *Garzaro v. University of Puerto Rico*, 575 F.2d 335, 337 (1st Cir. 1978); cf. *Harris v. Goldblatt Bros., Inc.*, 659 F.2d 784, 786 (7th Cir. 1981). But if the determination of damages will be mechanical and uncontroversial, so that the issues the defendant wants to appeal before that determination is made are very unlikely to be mooted or altered by it—in legal jargon, if only a "ministerial" task remains for the district court to perform—then immediate appeal is allowed. See *Boeing Co. v. Van Gemert*, 444 U.S. 472, 479 and n. 5 (1980); *Gulf Refining Co. v. United States*, 269 U.S. 125, 136 (1925); *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 826 (7th Cir. 1984); *Freeman United Coal Mining Co. v. Director, Office of Workers' Compensation Programs, supra*, 721 F.2d at 631; *United States v. Hughes*, 585 F.2d 284, 286 (7th Cir. 1978); *St. Louis Shipbuilding & Steel Co. v. Casteel*, 583 F.2d 876 and n. 1 (8th Cir. 1978); *Love v. Pullman Co.*, 569 F.2d 1074, 1076 (10th Cir. 1978); *Hattersley v. Bollt*, 512 F.2d 209, 213-14 (3d Cir. 1975); cf. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 216 n. 8 (1977). For if the further proceedings in the trial court are quite unlikely to make the appeal moot or even affect the issues on appeal, there is no reason to delay the appeal while they are resolved; and the delay may be a source of cost.

The line between the ministerial and the substantial is a very dim one, but we think this case falls on the ministerial side, if barely. It is not like *Strey v. Hunt Int'l Resources Corp.*, 696 F.2d 87 (10th Cir. 1982) (per curiam), where the order that was sought to be appealed determined the total damages of the class but did not indicate

how they were to be divided among the members, or *Norwood v. Harrison*, 563 F.2d 722 (5th Cir. 1977) (per curiam), where the order fixed the damages but did not say who had to pay them. Here all that remains to be done in the district court is for the members of the class to submit receipts or other evidence showing what they have paid or still owe the institutions; and the district judge made clear that the defendant agencies would be jointly and severally liable to the class members for whatever amounts are shown to be due. See 557 F. Supp. at 1290. Although computing the money owed each class member is not automatic, it is mechanical, is unlikely to engender dispute or controversy, and will require no analytic or judgmental determinations that might affect the questions now before us or give rise to other appealable questions; in particular, the district court will not have the problem of dividing up a pie among competing claimants whose claims in the aggregate exceed the pie. But at the same time, the processing of the individual class members' claims will not be costless, so that if this appeal is allowed and the state persuades us that no damages should be awarded, an expensive computation involving thousands of bills will be avoided. If the district court's order is upheld, still nothing will have been lost by the appeal. For in the unlikely event that any appealable issues arise in computing each class member's damage entitlement, they will not be factually similar to those raised by the present appeal, so there will be no judicial diseconomy if they are considered in a separate appeal.

We conclude that the order directing the state to reimburse (in an as yet undetermined amount) the parents of the class members is properly before us—though this conclusion owes nothing to Rule 54(b). For so far as we can tell nothing remains pending in the district court except calculating the actual amount owed each class member, which as we have said is not the resolution of a separate claim but merely the disbursement stage following what we have determined to have been the final judgment on damages.

Even if we are wrong in thinking that the order to pay is a final, appealable order, we can review it in

conjunction with the state's appeal of the permanent injunction. When an order in a case is properly appealed, the court of appeals can consider a closely related order if considering them together is more economical than postponing consideration to a subsequent appeal. See, e.g., *Bittner v. Sadoff & Rudoy Industries, supra*, 728 F.2d at 826-27; *Jenkins v. Blue Cross Mutual Hospital Ins., Inc.*, 522 F.2d 1235, 1237-38 (7th Cir. 1975), modified en banc on other grounds, 538 F.2d 164 (1976); *McKnight v. Blanchard*, 667 F.2d 477, 480-81 (5th Cir. 1982). Although this doctrine is subject to abuse of the tail-wagging-the-dog variety, which has led to its being given a circumscribed application well illustrated by *Kershner v. Mazurkiewicz*, 670 F.2d 440, 448-49 (3d Cir. 1982) (en banc), none of the limiting factors is present here. The only question we need consider—one we must decide anyway, to satisfy ourselves that we have jurisdiction over the entire appeal—is whether the permanent injunction is appealable. If so, the order to pay is sufficiently closely related to it to be appealable along with it even if not itself a final order.

Permanency and finality are not the same thing. The pendency of an unresolved damage issue could deprive a permanent injunction of its finality, in which event it would not be appealable under 28 U.S.C. § 1291. But 28 U.S.C. § 1292(a)(1) allows the immediate appeal of an interlocutory order granting an injunction, and the injunction need not be a preliminary one. The statute does not distinguish between preliminary and permanent injunctions; and beginning with *Smith v. Vulcan Iron Works*, 165 U.S. 518 (1897), many cases have allowed orders granting permanent injunctions to be appealed under section 1292(a)(1) or its predecessors. See 16 Wright, Miller, Cooper & Gressman, Federal Practice and Procedure § 3924, at pp. 67-79 (1977); *id.*, 1983 Pocket Part § 3924 (1984). Only when the denial of a request for a permanent injunction is not definitive (for example, because the district judge has merely denied the plaintiff's motion for summary judgment, and the plaintiff may

still get the injunction at the conclusion of the trial) is it not appealable under section 1292(a)(1). See, e.g., *Switzerland Cheese Ass'n, Inc., v. E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966); *Donovan v. Robbins*, Nos. 84-1287 et al., slip op. at 2-10 (7th Cir. Jan. 3, 1985). Grants of permanent injunctions always are. See, e.g., 16 Wright, Miller, Cooper & Gressman, *supra*, § 3924, at p. 67; *Schulner v. Jack Eckerd Corp.* 706 F.2d 1113, 1114 (11th Cir. 1983) (per curiam); *Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578, 584 n. 49 (D.C. Cir. 1980).

Although we thus have appellate jurisdiction, we must consider the state's argument that the suit became moot before it was certified as a class action. The state argues that its dispute with the Parkses ended on February 1, 1983—almost a month before the class certification—when the Illinois Supreme Court denied the state leave to appeal the state-court judgment requiring the state to reimburse Lester's living expenses at New Hope. Yet the state continued to refuse to pay Lester's living expenses at Willowglen, where he had been moved to. The refusal was not a contempt of the state court, because that court had not issued an injunction. It had no power to issue one (see Ill. Rev. Stat. 1981, ch. 110, ¶ 275); all it could do was order the state to pick up Lester's full tab at New Hope. Faced with the apparent determination of the state to keep on fighting, the Parkses turned to the district court and got a preliminary injunction ordering the state in effect to pay the arrears at Willowglen as well. If the state had thrown in the towel at this point and agreed not only to pay the Parkses' arrears at Willowglen but, for the future, to stop deducting any part of Lester's monthly expenses, and if the district court had been persuaded of the state's sincerity, the case would have been moot and the court could not have gone on to certify it later as a class action. See *Sosna v. Iowa*, 419 U.S. 393, 402 (1975); *Indianapolis School Comm'rs v. Jacobs*, 420 U.S. 128 (1975) (per curiam); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 430 (1976); *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1046 (5th Cir. 1981). It is

true that a case in this circuit holds that if the defendant "buys off" the named plaintiff while a motion for class certification is pending, the case may not be moot. See *Susman v. Lincoln American Corp.*, 587 F.2d 866, 870 (7th Cir. 1978); cf. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 398-404 (1980). Otherwise defendants could postpone certification until the statute of limitations ran, simply by buying off in succession the class members who stepped forward as named plaintiffs—for every time the named plaintiff was bought off, the suit would have to be dismissed. But there is no suggestion that this is what happened here. Indeed, at no time till the filing of the state's reply brief in this court did the state indicate that its dispute with the Parkses is over.

Moreover, even if today that dispute is finally over, the class action would not be moot unless the dispute was over before the class was certified back in February 1983; and the evidence is against such an inference. The state filed a notice of appeal from the preliminary injunction at the same time that it filed its notice of appeal from the permanent injunction and order to pay, which was in July 1983, months after the class had been certified. A notice of appeal filed more than a year after the order sought to be appealed is a legal nullity, and in any event the state never briefed its appeal from the preliminary injunction and we consider it thoroughly abandoned. But the only important point is that after the class was certified, the state, by appealing from the preliminary injunction, gave an objective indication that it was still at war with the Parkses and not just with the class. Maybe in its heart of hearts the state had conceded the validity of Lester's claim (though not that of the members of the class) back in February. But to make the case moot the state would have had to communicate its change of heart to the Parkses or the district court—which it has never done—in order to give the attorneys for the class a chance to find a substitute class representative. A case does not become moot because one of the parties, while continuing to take all the steps that a live adversary would take to assert his

rights, has secretly concluded that come what may he will give his opponent everything the opponent seeks. And even now it is unclear whether the state has committed itself to continue paying Lester's living expenses.

The state also argues that the judgment in the Parkses' state-court action was res judicata and hence bars the present suit. This is clearly wrong. The Parkses could neither have joined with their action for administrative review a claim for an injunction or for reimbursement of their past expenditures—the state court, as we said, did not have the power to grant such relief—nor have bypassed the administrative-review process and brought their first and only suit in federal district court. See 20 U.S.C. §§ 1415(b), (c), (e)(2). The administrative-review proceeding was no substitute for an action seeking equitable and monetary relief under the Education for All Handicapped Children Act, and "a litigant should not be penalized for failing to seek unified disposition of matters that could not have been combined in a single proceeding." 18 Wright, Miller & Cooper, Federal Practice and Procedure § 4412, at p. 93 (1981); see Restatement, Second, Judgments § 24, comment g; § 26, comment c (1980).

The Parkses' collateral estoppel argument is as unavailing as the state's res judicata argument. They argue that the state should be estopped to deny that it has violated the Act, since the state court found that it had violated the Act. But the state court relied very heavily on the district court's first opinion in this case, and a court cannot use its own preliminary-injunction findings to estop a party to contest those findings at the trial on the merits. See, e.g., *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). In any event, if the Parkses wanted the district court to invoke collateral estoppel "offensively," that is, to bar the state's defending itself against their suit, they had to ask the district court, and they did not. Since the doctrine of offensive collateral estoppel requires an exercise of "broad discretion" by the district court, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979), it cannot be applied in the first instance by the appellate court except in the clearest of cases, which this obviously is not.

We come at last to the question whether the permanent injunction was proper. This depends on whether the state has violated the Education for All Handicapped Children Act by requiring parents to pay any part of the living expenses of handicapped children who are placed in a private facility on the ground of developmental disability rather than of educational need. The issue can be focused by considering a series of hypothetical cases. In the first, a deaf and blind child, perfectly capable of living at home, is institutionalized on the basis of a judgment that he can get a better education in a more controlled environment. His living expenses in the institution would be expenses of his special education within the meaning of the Act and his parents would be entitled to reimbursement for them. It is true that the Act does not specify room and board in residential institutions as components of a "free" public education, that "special education" is defined as "instruction," and that the detailed list of "related services" does not include room and board. But the fact that "special education" covers education in institutions (including hospitals, which are primarily residential institutions), 20 U.S.C. § 1401(16), and that "related services" covers transportation, § 1401(17), suggests that Congress took for granted that room and board were components of a free public education when the education had to be conducted in a residential institution, and mentioned transportation separately in order to make clear that the expense of commuting to a day school would also be covered. And however the statute should be interpreted as an original matter, Illinois does not challenge the validity of the federal regulation that explicitly requires reimbursement of the child's living expenses in an educational institution. See 34 C.F.R. § 300.302; *Doe v. Anrig*, 692 F.2d 800, 810 n. 20 (1st Cir. 1982) (overruled on other grounds in *Doe v. Brookline School Comm.*, 722 F.2d 910 (1st Cir. 1983)); *Abrahamson v. Hershman*, 701 F.2d 223, 227 (1st Cir. 1983).

In our second hypothetical case, the child is in a coma, and is institutionalized because he cannot be cared for at

home. We understand the plaintiffs to be conceding (and the Supreme Court's opinion in *Rowley* implies, see 458 U.S. at 202-03) that since the child would be completely uneducable in his condition—since he could not benefit from special education no matter how expensive—his living expenses in the institution would not be chargeable to the state under the Act. They would not be expenses of or related to education, made pursuant to the "individualized education program" that the law requires the state to create for each handicapped child. See 20 U.S.C. §§ 1401(18), 1412(4), 1414(a)(5).

In the third case, an intermediate case that is similar but not identical to this case, the child cannot be cared for at home because of some purely physical problem, but, because of that problem, neither can he be educated unless he is institutionalized. See *Irving Independent School District v. Tatro*, 104 S. Ct. 3371, 3378 n. 11 (1984). Maybe he requires continuous medical attention which he could not get in a regular day school. So he must be institutionalized for educational reasons but equally for medical reasons. If one analogized the failure to reimburse the living expenses of such a child to a common law tort, the conclusion would be that the state was not liable for them; if the child will have to live in an institution anyway, regardless of his educational needs, those living expenses are not caused by his educational needs, for they will be incurred whether or not any effort is made to educate the child. Cf. *New York Central R.R. v. Grimstad*, 264 Fed. 334 (2d Cir. 1920); *Weeks v. McNulty*, 101 Tenn. 495, 48 S.W. 809 (1898); Prosser and Keeton on the Law of Torts § 41, at pp. 265-66 (5th ed. 1984). But the Education for All Handicapped Children Act is not a tort statute, and to read it as one would lead to the odd result that the more the child's handicap interfered with his living, and not just with his education, the more his parents would have to pay. This result is inevitable to some extent; if the child is so far handicapped as to be unconscious, and is thus wholly uneducable, he falls outside the protection of the

Act even though his handicap is more rather than less severe than that of the children protected by the Act. And even within the class of those children who are educable, it can be argued that the limited funds allocated for the education of the handicapped could be employed more productively on a child likely to make real educational progress with their assistance than on one too severely retarded to benefit much at all.

However these considerations might seem to balance out as an original matter, the courts that have considered the question have rejected the argument that a state can avoid its obligations under the Act by showing that the child would have had to be institutionalized quite apart from educational needs that also required institutionalization. See *Kruelle v. New Castle County School District*, 642 F.2d 687, 693-96 (3d Cir. 1981); *Gladys J. v. Pearland Independent School District*, 520 F. Supp. 869, 876 n. 8 (S.D. Tex. 1981); and other cases cited in Note, *Defining the Scope of Residential Placement and Related Services Under the EHA: Difficult Questions Left Unanswered in Illinois—In re Claudia K.*, 32 DePaul L. Rev. 483, 510-11 n. 132 (1983). And this is an easier case for liability. It is not true, or at least not proved, that Lester and the other members of the class are in such a condition that they could not be kept at home even if no one were concerned with their educational needs. The basic meaning of developmentally disabled in the Illinois statute, as in the professional literature, see, e.g., Thompson & O'Quinn, Developmental Disabilities, ch. 1 (1979), is mentally retarded; and parents who are indifferent to the mental deficiencies of their severely retarded child can raise the child quite comfortably at home—it is as if the child's infancy were prolonged. In light of the close connection between mental retardation and special educational need, it comes as no surprise that developmental disability, far from being an exempted category, is an important subcategory of the handicaps covered by the Act. Although the Act does not use the term developmental disability, it defines "handicapped children" to include

children who are "mentally retarded," or are "seriously emotionally disturbed," or are "other[wise] health impaired," or have "specific learning disabilities." 20 U.S.C. § 1401(1). And the regulations under the Act (whose validity the state, again, does not challenge) make clear that these terms include such conditions as autism, brain injury, epilepsy—and in fact everything else that comes within the state statute's, and the profession's, definition of developmentally disabled. See 34 C.F.R. §§ 300.5(b)(4), (b)(7), (b)(9). A later federal statute, the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000 *et seq.*, does use the term "developmental disability" and provides additional assistance for these unfortunate people, in this respect supplementing the Education for All Handicapped Children Act. See 42 U.S.C. § 6000(b)(2)(A). But there is no suggestion that Congress thought they had been excluded from the earlier Act; they manifestly had not been.

So what the State of Illinois has done is to carve out a class of handicapped children and deny them the full reimbursement that the Education for All Handicapped Children Act, as authoritatively construed in a regulation that the state does not challenge, entitles them to. True, it does this only in cases where the child is placed in a residential facility "because" he is developmentally disabled, rather than "because" he is handicapped and needs special education. But in light of what developmental disability means, the distinction between these causes is purely verbal. To assign a person to a residential facility because his mind is backward is, except perhaps in the severest cases, to assert a need for special education. With persons as severely retarded as Lester Parks the scope for education is extremely limited, but we do not understand the state to be arguing that Lester or the other members of the class are uneducable. Nor would such an argument be likely to succeed (see, e.g., *Abrahamson v. Hershman*, *supra*, 701 F.2d at 228); 3-6 year olds are educable. The state might as well have said, we choose to classify as developmentally disabled those children whose only need is for special education.

The next question is the propriety of the damages remedy. The Education for All Handicapped Children Act

creates a private right of action against state agencies (the parties agree that in naming the heads of the various state agencies as the defendants in this case the plaintiffs meant to sue the agencies, not the defendants in their individual capacities, cf. *Brandon v. Holt*, 53 U.S.L.W. 4122 (S. Ct. 1985)), which means, against the state; and the court (state or federal) is to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2). There is no reference in either the statute or the legislative history to damages. We think the omission is significant. It is true that since the Act was passed "in order to assure equal protection of the law," 20 U.S.C. § 1400(b)(9); see *Smith v. Robinson*, 104 S. Ct. 3457, 3468-70 (1984)—which is to say under the authority granted to Congress by section 5 of the Fourteenth Amendment—the Act would not violate the Eleventh Amendment if it provided a damage remedy against the state. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). But that does not answer the question whether it does provide such a remedy. Mindful of the frictions that arise whenever the states' historical immunity from suit in federal court is withdrawn, the Supreme Court has told us to require a clear showing of congressional intent before we conclude that it has been. See, e.g., *Quern v. Jordan*, 440 U.S. 332, 343-44 (1979). But this directive cannot carry the day for the state. The purpose of sovereign immunity is to protect the public fisc; and having explicitly authorized suits against the states for "appropriate relief" that will often require state expenditures, Congress in the Education for All Handicapped Children Act may be thought to have abrogated that immunity explicitly.

On the other hand, the subsection on judicial relief appears in a section captioned "Procedural Safeguards," 20 U.S.C. § 1415, and is stated in terms of the rights of a "party aggrieved." This suggests that the civil action created by subsection (e)(2) may have been intended merely to authorize judicial review of agency action, and not to create a right to seek damages. Jurisdiction to review agency action is frequently given to district courts,

especially where, as here, the action is informal in character. See, e.g., *Illinois Dept. of Public Aid v. Schweiker*, 707 F.2d 273, 276-78 (7th Cir. 1983); *Rockford League of Women Voters v. Nuclear Regulatory Comm'n*, 679 F.2d 1218, 1221 (7th Cir. 1982); Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 Colum. L. Rev. 1 (1975). It seems unlikely, moreover, that a majority of the Congress would have wanted to authorize federal courts to impose on the states potentially heavy monetary liabilities at the behest of private plaintiffs, especially when injunctive relief alone, directed as it usually will be to requiring the states to maintain expensive programs, will impose such liabilities indirectly. It is not as if the Act had been passed to eliminate traditionally wrongful practices. That participation in the Act is voluntary is some evidence that a state's refusal to devote much greater resources to educating handicapped than normal children is not such morally wrongful conduct as Congress could be expected to make tortious by creating an automatic damage remedy. If such refusal is discriminatory, it is discriminatory in a special (if frequent modern) sense: not as a refusal to treat equally, but as a refusal to rectify a natural inequality (that between the educability of a handicapped and a normal child) by devoting more resources to the victims of the inequality.

Although it could well be concluded that there is no damage remedy at all under the Education for All Handicapped Children Act, no court has yet embraced this conclusion (the issue is an open one in the Supreme Court, see *Smith v. Robinson*, *supra*, 104 S. Ct. at 3473 n. 24)); nor need we do so in order to decide this case. The courts of appeals that have indicated (always in dictum) that damages might be available under the Act limit that availability to circumstances more extraordinary than those in this case. See *Anderson v. Thompson*, 658 F.2d 1205, 1213-14 (7th Cir. 1981) (physical danger to child, or bad faith by state); *Miener v. Missouri*, 673 F.2d 969, 980 (8th Cir. 1982). Although two district court decisions

evince a more liberal approach, see *Gregg B. v. Board of Education*, 535 F. Supp. 1333, 1338-39 (E.D.N.Y. 1982); *Monahan v. Nebraska*, 491 F. Supp. 1074, 1094 (D. Neb. 1980), modified on other grounds, 645 F.2d 592 (8th Cir. 1981), the approach taken in *Monahan* was implicitly rejected by the district judge's circuit in *Miener*.

That does not end our inquiry into the propriety of the district court's giving the plaintiffs *some* monetary relief. A court of equity can issue orders, monetary in character, that are ancillary to its equitable judgments, and the power is not limited to such obvious examples as contempt and attorney's fees for resistance to the judgment. See, e.g., *Alexander v. Hill*, 707 F.2d 780, 783 (4th Cir. 1983). This principle is applicable to the present case even if, as we have suggested might well be the case, section 1415(e)(2) was intended merely to create an avenue for judicial review of agency action (here the action of the state in refusing to reimburse the living expenses of the handicapped children in full). Such review is equitable in nature, see, e.g., *Mosey Mfg. Co. v. NLRB*, 701 F.2d 610, 613 (7th Cir. 1983) (en banc), whether or not exercised (as here) to enjoin the agency, and it therefore includes the power to formulate whatever remedies are necessary to make judicial review effective. See, e.g., *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 187-88 (1941); *Indiana & Michigan Elec. Co. v. FPC*, 502 F.2d 336, 346-48 (D.C. Cir. 1974); *Reich v. Webb*, 336 F.2d 153, 158 (9th Cir. 1964). On this ground an order to pay the outstanding bills of the parents of handicapped children strikes us as a proper incident (though barely so) to the injunctive relief ordered by the district court. If the state refuses to pay and the parents cannot come up with the money, their children will be ordered out of the institutions. The permanent injunction will be thwarted —all the more clearly since the institutions will not take the children back so long as their bills are unpaid. In authorizing the district court to provide appropriate relief, Congress must have intended that the court be able to do what was reasonable and necessary to make sure that

handicapped children receive the services to which the Act entitled them.

"Necessary," however, exaggerates what the district court did here. Living expenses are charged in the amount of $100 a month only against families with annual incomes of at least $15,600, though this is hardly affluence, and though $100 a month is not a trivial amount for a family whose entire income is less than $16,000 a year. But even if most of the class members could pay the past-due bills for living expenses, we do not think the district judge exceeded the limits of his equitable discretion by requiring the state to pay off these old bills, for an illegal charge, rather than forcing the parents to dig down into their pockets for what could be, to them, sizable lump-sums.

His order, however, has a much broader sweep. It directs reimbursement of all the expenses that the parents have paid back to 1978. This part of the order cannot be justified as necessary to prevent the children from being expelled from the institutions in which they are receiving their special education. The plaintiffs argue, however, that (1) all they are seeking is reimbursement of certain expenses, not full common law damages; (2) in other words, they are just asking for restitution; (3) it is more than justified by the egregious nature of the state's violation. The first point is correct, but we do not think the statute creates an automatic right of reimbursement any more than it creates an automatic right of common law damages. Calling what they are asking for "restitution" does not strengthen the plaintiffs' case. Indeed, since restitution, being measured by the wrongdoer's profit rather than the victim's loss, can result in a larger money judgment than damages, see, e.g., Dobbs, Handbook on the Law of Remedies 223 (1973), and partly for this reason is often reserved for the more serious types of wrongdoing, it is even less likely that Congress intended to subject the states to open-ended liability in suits for restitution than to make them subject to suits for damages. The plaintiffs' second and third points we reject.

Restitution in the only sense in which it might be thought to add a moral weight to the plea for reimbursement refers to the situation where the defendant has been unjustly enriched at the plaintiff's expense. See *Iconco v. Jensen Construction Co.*, 622 F.2d 1291, 1295 (8th Cir. 1980); *S.S. Silverblatt, Inc. v. East Harlem Pilot Block—Building 1 Housing Development Fund Co.*, 608 F.2d 28, 37 (2d Cir. 1979); 1 Palmer, The Law of Restitution § 1.1 (1978); cf. *Hurry v. Jones*, 560 F. Supp. 500, 508 (D.R.I. 1983). That might be the situation here if Illinois had taken the plaintiffs' money and used it for some activity unrelated to the needs of handicapped children. But there is no argument that anything of this sort has occurred. So far as appears, any money that the state saved by not fully reimbursing the parents of handicapped children has gone into programs for the benefit of those children. And finally we do not think the state's behavior was egregious. The state has an arguable position; we have rejected it, but it is not therefore insubstantial.

We conclude that the district judge erred in ordering reimbursement of the parents' overpayments beyond what was necessary to clear outstanding bills that unless paid would cause the handicapped children to be expelled from the institutions in which the state had placed them. Of course this favors those parents who have paid their bills over those who have not, but presumably the latter are, on average at least, more necessitous and not just less responsible.

The plaintiffs cite as an alternative basis for monetary relief section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Although they concede as they must in light of *Smith v. Robinson*, *supra*, that the more detailed provisions of the Education for All Handicapped Children Act supersede section 504 within the later Act's domain and thus extinguish any separate damages claim since 1978, they argue that section 504 allows them to get damages back to 1977 (we do not know why this was made the damage cut-off date). Passing the murky question of just what pecuniary remedies section 504 provides, we do not

interpret it to force states to create special programs for handicapped children. Section 504 merely provides that "no *otherwise qualified* handicapped individual in the United States, . . . shall, *solely by reason of his handicap*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . ." (emphasis added). This protects a handicapped person from being denied the same benefit (a job, or whatever) as a normal person but does not require the state to devote extra resources to bringing the handicapped up to the level of the normal. See *Southeastern Community College v. Davis*, 442 U.S. 397, 405, 411-13 (1979).

Lastly, the state complains about the district court's including in the decree the Governor's Purchase Care Review Board. Although the Board's relationship to the decisions that resulted in the denial of reimbursement to the parents of handicapped children for living expenses is obscure, the district judge was justified in including the Board in the decree to make sure that the decree is not thwarted by the omission of a state agency that might by inaction hamper the carrying out of its provisions.

To summarize, the permanent injunction is affirmed, as is the part of the district court's order concerning monetary relief that directs the state to pay the outstanding bills of the class members for living expenses. However, the part of that order that directs the state to reimburse the class members for the bills that they have already paid is reversed. No costs shall be awarded in this court, and Circuit Rule 18 shall not apply to the further proceedings in the district court.

AFFIRMED IN PART AND REVERSED IN PART.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Richard PARKS, Marilyn Parks, Lester Parks, by his parents and next friends, Richard Parks and Marilyn Parks, on their own behalf and on behalf of all others similarly situated, Plaintiffs,

v.

Ivan PAVKOVIC, Director, Department of Mental Health and Developmental Disabilities, Edward Copeland, Chairman, Illinois State Board of Education, Ruth Love, Superintendent, Chicago Public Schools, Patricia Barger, Representative, Department of Mental Health and Developmental Disabilities, Robert Mandeville, Director, Bureau of the Budget, William Kempiners, Director, Department of Public Health, Jeffrey Miller, Director, Department of Public Aid, Gregory Coler, Director, Department of Children and Family Services, Robert Granzeier, Acting Director, Department of Vocational Rehabilitation, Donald Gill, State Superintendent of Education, individually and in their official capacities, Defendants.

No. 82 C 965.

United States District Court,
N.D. Illinois, E.D.

Feb. 28, 1983.

Severely emotionally disturbed child and his parents brought action against state of Illinois and several state agencies alleging that state, through its agencies, was depriving handicapped child of his right to free appropriate public education. The District Court, Prentice H. Marshall, J., held that: (1) class consisting of all handicapped Illinois children between ages of three and 21 and their parents who had been refused full funding for private special educational placement as result of state policy of assessing portion of special education costs

designated as responsible parent liability would be certified; (2) Department of Mental Health and Developmental Disabilities was bound by terms of Act; (3) Illinois statutory scheme was not necessary to enable state to fulfill its obligations under Fourteenth Amendment; (4) Illinois statutory scheme was in conflict with federal law and invalid under supremacy clause; (5) Illinois State Board of Education, Department of Mental Health and Developmental Disabilities, Governor's Purchased Care Review Board, and Chicago Board of Education were all liable for violation of Act; and (6) order requiring defendants to reimburse plaintiffs for costs assessed against them as responsible relative liabilities was appropriate.

Order accordingly.

* * *

MEMORANDUM OPINION

PRENTICE H. MARSHALL, District Judge.

This is a disturbing case. Plaintiffs have brought to our attention one of the most blatant violations of federal law imaginable. It appears that the State of Illinois has been openly violating the rights of handicapped children. Defendants, instead of promptly moving to correct the problem, or even arguing that they have complied with federal law, defend this case almost entirely by finger-pointing. Each state and local agency involved in this case does little more than claim that it is not responsible for the plight of handicapped children in Illinois, and urges the court to pin the blame elsewhere. While this bureaucratic infighting rages, none of these public servants before the court seem concerned about finding a way to remedy the problem. That is a task that must, by default, fall on this court. We now undertake it.

THE FACTS

Named plaintiff Lester Parks is a severely emotionally disturbed child in need of special education and related

services. Because he is so severely disabled, he must be placed in a residential facility which can provide him with the intensive educational and support services that he needs. In early 1980, Lester's parents became fearful that the facility in which he then resided, New Hope Living and Learning Center, was in danger of closing. They sought help from the Chicago Board of Education ("CBE") and the Illinois Department of Mental Health and Developmental Disabilities ("DMHDD") in finding an alternative placement for Lester.

In July, 1980, DMHDD placed Lester in Willowglen Academy, a residential treatment center in Milwaukee, Wisconsin. However, DMHDD did not pay for the cost of the ensuing treatment and special education that Lester received there. Eventually, Willowglen announced that it would discharge Lester on March 25, 1982 unless his outstanding bill was paid. In an effort to prevent the imminent discharge, Lester and his parents filed this suit on February 18, 1982. On March 19, this court ruled that defendants, the various state and local officials responsible for providing Lester with an education under state and federal law, had apparently breached their duty to provide Lester with a free appropriate public education, and issued a preliminary injunction requiring them to assure Willowglen that they would pay Lester's outstanding bill, so that it would not discharge him. *See Parks v. Pavkovic*, 536 F.Supp. 296 (N.D.Ill.1982).[1]

Pending before the court are plaintiffs' motions for class certification and partial summary judgment.

THE MERITS

Before turning to the specific issues pending before the court, an examination of the merits of this lawsuit is necessary. The merits of the case provide the necessary per-

[1] In our earlier opinion, we stated many of the facts and legal principles applicable to the pending motions. We will not repeat them here, but merely refer to the prior opinion where necessary.

spective from which the more specific issues raised can be viewed.

"It is the purpose of this Act to assure that all handicapped children have available to them, within the periods specified . . . a free appropriate public education." So goes the preamble to the Education for All Handicapped Children Act of 1975 ("EHA"), 20 U.S.C. § 1400(c) (Supp. V 1981). The Act goes on to provide that participating states such as Illinois must provide a free appropriate public education to all handicapped children ages three to eighteen by September 1, 1978, and to all children ages three to twenty-one by September 1, 1980. *Id.* § 1412(2)(B) (1976). Local educational agencies in participating states are also required to provide a free appropriate public education. *Id.* § 1414(a)(1)(C)(ii).[2]

The free appropriate public education guaranteed by the act includes both special education and related services provided at public expense. *See* 20 U.S.C. § 1401(18) (1976). "Related services" include all supportive services necessary to enable a handicapped child to benefit from special education. *Id.* § 1401(17). "Related services," if they include placement in a residential facility, must be free of charge.

> If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

34 C.F.R. § 300.302 (1981).[3]

Thus, the EHA unambiguously requires Illinois to provide an appropriate public education at no cost to the

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[2] *See generally* 34 C.F.R § 300.300 (1981).

[3] None of the defendants challenge the validity of this or any other regulation of the United States Department of Education construing the EHA's requirements.

parents of handicapped children.[4] For reasons that escape us, however, Illinois chooses not to comply with this clear federal mandate. The Illinois Mental Health and Developmental Disabilities Code provides,

> Each recipient of services of the Department, and the estate of such recipient, is liable for the payment of sums representing charges for services to such recipient at a rate to be determined by the Department in accordance with this Act. If such recipient is unable to pay or if the estate of such recipient is insufficient, the responsible relatives are severally liable for the payment of such sums, or for the balance due in case less than the amount prescribed under this Act has been paid. The maximum services charged for each patient assessed against responsible relatives collectively may not exceed financial liability determined from income in accordance with the uniform schedule in Section 5-116 of this Act.

Ill.Rev.Stat. ch. 91½, § 5-105 (1981). The Act goes on to authorize DMHDD to assess the responsible relative liability created by the act to the responsible relatives, and creates a schedule for the assessment of costs based on

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[4] In addition to those authorities cited in our earlier opinion, *see Rabinowitz v. New Jersey State Bd. of Educ.*, 550 F.Supp. 481 (D.N.J.1982); *Davis v. Maine Endwell Central School Dist.*, 542 F.Supp. 1257, 1258 (N.D.N.Y.1982); *Gary B. v. Cronin*, 542 F.Supp. 102, 109 (N.D.Ill.1980); *William S. v. Gill*, 536 F.Supp. 505, 510 (N.D.Ill.1982); *Parks v. Illinois Dep't of Mental Health & Dev. Disab.*, 110 Ill.App.3d 184, 186-88, 65 Ill.Dec. 695, 697-98, 441 N.E.2d 1209, 1211-12 (1982). The Rehabilitation Act, 29 U.S.C. § 794 (1976), also guarantees the provision of a free appropriate public education to handicapped children. *See Parks*, 536 F.Supp. at 304 n. 16. In dicta, the Supreme Court has acknowledged that the EHA requires that states not charge for the provision of an appropriate education to handicapped children. *See Board of Educ. v. Rowley*, ___ U.S. ___, ___, 102 S.Ct. 3034, 3041, 73 L.Ed.2d 690 (1982) (the provision of a free appropriate public education requires that "instruction and services be provided at public expense").

the annual income of the recipient or his responsible relatives. *See id.* §§ 5-106 to 5-116.

Under this statutory scheme, DMHDD charges parents of handicapped children amounts equal to the responsible relative liability that they calculate for each recipient of services. In 1982, DMHDD made 207 assessments of responsible relative liability covering 478 recipients of services. Answers to Interrogatories by Defendant Pavkovic # 5. Lester's case is illustrative. His parents have been charged $100 per month since he was placed in Willowglen. This is despite the fact that Lester's father is unemployed. Plaintiffs have submitted affidavits from other parents of handicapped children who have had to pay similar charges. Thus, the free appropriate public education that is guaranteed by federal law is, in Illinois, anything but free.

CLASS CERTIFICATION

In challenging the assessment of a responsible relative liability,[5] plaintiffs seek to have this case certified as a class action on behalf of

> All handicapped Illinois children between the ages of three and twenty-one and their parents who have

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[5] In our earlier opinion, we acknowledged that the EHA requires plaintiffs to exhaust their administrative remedies before seeking judicial relief, but held that plaintiffs had adequately attempted to exhaust and that further resort to administrative remedies would be futile. In addition to the authority relied on in the earlier opinion, *see Vander Malle v. Ambach*, 673 F.2d 49, 52 (2d Cir. 1982); *Jose P. v. Ambach*, 669 F.2d 865, 869-70 (2d Cir.1982); *Gregg B. v. Board of Educ.*, 535 F.Supp. 1333, 1336-38 (E.D.N.Y.1982); *Ruth Anne M. v. Alvin Indep. School Dist.*, 532 F.Supp. 460, 463 (S.D.Tex.1982). Since then, ISBE has refused to decide plaintiffs' administrative appeal, though federal law requires it to decide the appeal within 30 days. 34 C.F.R. § 300.512(c) (1981). Thus, we continue to believe that plaintiffs have done everything possible to exhaust their administrative remedies, and that further resort to those remedies would be futile.

been refused full funding for private special education placements as a result of any of the following Illinois State Board of Education ("ISBE"), Illinois Department of Mental Health and Developmental Disabilities ("DMHDD"), Governor's Purchased Care Review Board ("GPCRB"), and Chicago Board of Education policies and practices:

a. DMHDD policy not to pay a portion of special education costs designated as "responsible relative liability;"

b. ISBE policy not to pay the DMHDD-designated responsible relative liability;

c. ISBE policy not to assure that other state agencies pay the DMHDD-designated responsible relative liability;

d. Chicago Board of Education practice not to pay the DMHDD-designated responsible relative liability for the children within its jurisdiction.

There are four prerequisites to class certification.

> (1) [T]he class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a).

This case satisfies the numerosity requirement. The parties appear to agree that the proposed class runs into the hundreds.

The case also satisfies the commonality requirement. The questions whether defendants fail to pay responsible relative liability and, if so, whether this violates federal law making judicial intervention appropriate are common to the class.

The typicality inquiry examines the relationship between the representative party's claims and the class' claims. Certification is appropriate unless the named plaintiffs present unique claims personal to them which are unlikely to be a major focus of litigation. *See Patterson v. General Motors Corp.*, 631 F.2d 476, 481 (7th Cir.1980), *cert. denied*, 451 U.S. 914, 101 S.Ct. 1988, 68 L.Ed.2d 304 (1981); *Koos v. First National Bank*, 496 F.2d 1162, 1164 (7th Cir.1974). Defendants launch a number of arguments entirely irrelevant to Lester's claim in an attempt to show it is not "typical."

First, defendants argue that Lester was not entitled to funding for his placement at Willowglen because his parents unilaterally placed him there. Plaintiffs allege to the contrary that DMHDD placed him there. Whichever is the truth is of little consequence, however. If DMHDD disagreed with Lester's parents' decision to send him to Willowglen, they could have refused to fund it, and insisted that he remain at New Hope pending administrative review. 20 U.S.C. § 1415(e)(2) (Supp. V 1981). Instead, DMHDD agreed to fund the placement at Willowglen, even before this suit was filed. The EHA will not countenance defendants' decision to accede to Lester's placement at Willowglen as long as they need not fully fund it. *See* 536 F.Supp. at 305. If DMHDD has initiated the administrative process for returning Lester to New Hope, this might be a different case.[6] However, that has not happened. It is little short of shameful for DMHDD to be content to leave Lester at Willowglen as long as it need not fully fund his placement.

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[6] Even then, however, the Act's status quo provision, requiring that handicapped children remain in their current placements pending administrative review of a proposed transfer, might require DMHDD to fund Willowglen pending a hearing. *See id.* Even when a child is in an unapproved placement, the EHA requires defendants to provide him with a free appropriate public education while they attempt to find him a suitable alternative placement. *See Vander Malle v. Ambach*, 673 F.2d 49, 52-53 (2d Cir.1982).

Second, defendants argue that Lester's claim is barred by res judicata. Lester successfully challenged DMHDD's imposition of a responsible relative liability during the period he was at New Hope in Illinois state court. *See Parks v. Illinois Department of Mental Health and Developmental Disabilities*, 110 Ill.App.3d 184, 65 Ill.Dec. 695, 441 N.E.2d 1209 (1982), from which leave to appeal was denied by the Illinois Supreme Court. However, defendants have never pleaded this defense as required by Fed.R.Civ.P. 8(c). Moreover, that judgment hardly precludes this action. The state court action was under the Illinois Administrative Review Act. As a result, the only relief plaintiffs could obtain was a reversal of the decision to impose a responsible relative liability for the placement at New Hope. The state court could not have provided prospective injunctive relief, or struck down the imposition of the liability for the Willowglen placement, which occurred long after the state action had been brought. *See* Ill.Rev.Stat. ch. 110, ¶ 275 (1981). Thus, plaintiffs' claims for prospective relief and reimbursement for costs assessed at periods other than while Lester was at New Hope could not have been litigated in the state action, and cannot be barred here. Plaintiffs' victory in state court means they cannot also recover the New Hope charges here, but they can recover the Willowglen charges and obtain injunctive relief against future Willowglen charges. These claims are fully typical of those of absent class members. *See Tonya K. v. Chicago Board of Education*, 551 F.Supp. 1107, 1111 (N.D.Ill. 1982). Whatever funds plaintiffs recovered in state court that cannot be recovered here should be easily determinable and not a major focus of this litigation.[7]

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[7] Defendants also claim Willowglen is not eligible for funding because it is not a state-approved institution, it did not submit the proper forms, CBE did not submit the proper forms and a variety of similar bureaucratic reasons, none of which involve any faults on the part of Lester or his parents. As long as Lester remains a handicapped child entitled to statutory protection, defen-

(Footnote continued on following page)

The final prerequisite to certification involves the adequacy of the named plaintiffs' representation. The named plaintiffs' attorney must be qualified to conduct the litigation, and the plaintiff must not have interests antagonistic to those of the class. *Susman v. Lincoln American Corp.*, 561 F.2d 86, 90 (7th Cir.1977). The named plaintiffs are represented by the venerable Edwin F. Mandel Clinic University of Chicago Law School which has an outstanding track record, and their attorney has pursued this and similar litigation in a loyal and competent manner. The named plaintiffs have no interests antagonistic to those of the class. They seek to realize the promise of a free appropriate public education, just as do all other class members.

Having satisfied the prerequisites, plaintiffs seek certification under Fed.R.Civ.P. 23(b)(2), which applies where defendants have acted on grounds generally applicable to the class making final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole.

Defendants do not dispute that if plaintiffs prevail, final injunctive relief and corresponding declaratory relief would be appropriate. Their only argument is that the class definition is overbroad in that it overlaps with a class of emotionally disturbed children which obtained relief from Chief Judge McGarr of this court in *Gary B. v. Cronin*, 542 F.Supp. 102 (N.D.Ill.1980). However, defendants never explain why the alleged overlap means they have not acted on grounds generally applicable to the class. It appears that the responsible relative liability is imposed on all class members, whether or not they were also in the *Gary B.* class. Defendants never argue otherwise. Nor do

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[7] *continued*
dants are not permitted to leave Lester in an unfunded placement. While Willowglen, CBE or others may have made mistakes, "that circumstance does not permit the State to disclaim its statutory responsibilities," *Vander Malle v. Ambach*, 673 F.2d 49, 52 (2d Cir.1982).

they argue that *Gary B.* classmembers' claims are barred by res judicata or otherwise. They do argue that relief here would be "inconsistent" with the *Gary B.* decree but again do not explain how. In fact. *Gary B.* ordered defendants to provide certain "related services" free of charge, which is entirely consistent with the relief plaintiffs seek here.

The motion for class certification should be and hereby is granted.

PARTIAL SUMMARY JUDGMENT

In their motion for partial summary judgment, plaintiffs contend that DMHDD's assessment of a responsible relative liability violates federal law, and specifically the duty to provide a free appropriate public education.

The only defendant that even attempts to defend the responsible relative liability under the Illinois Mental Health and Developmental Disabilities Code is DMHDD.

First, DMHDD argues that it is not bound by the EHA. This argument is frivolous. The Act applies to all state agencies "involved in the education of handicapped children." 34 C.F.R. § 300.2(b) (1981). DMHDD surely is involved in the education of handicapped children; it pays for the education of Lester and hundreds of handicapped children like him each year. This argument was made by DMHDD and rejected by us in our earlier opinion, *see* 536 F.Supp. at 304, and by the Illinois Appellate Court in the New Hope case, *see* 110 Ill.App.3d at 188, 65 Ill. Dec. at 698, 441 N.E.2d at 1212.[8] It fares no better the third time around.

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[8] *See also Jose P. v. Ambach*, 669 F.2d 865, 870-71 (2d Cir.1982). The federal regulations construing the EHA explicitly state that the Act applies to "Departments of Mental Health." 34 C.F.R. § 300.2(b)(3) (1981).

Second, DMHDD argues that the EHA is unconstitutional because it conflicts with the fourteenth amendment.[9] DMHDD argues that due process requires it to place handicapped children in the least restrictive environment possible.[10] Imposing a responsible relative liability is necessary, DMHDD argues, to give parents an incentive not to seek overly restrictive care for their children. Accordingly, the Illinois statutory scheme is necessary to enable the state to fulfill its obligation under the fourteenth amendment.

This argument, too, is frivolous. Defendants nowhere explain why parents will always opt for the most restrictive placement. In fact, the amount of the responsible relative liability assessed hinges on the parents' income, not on the restrictiveness of the placement. Thus, the Illinois scheme does not create a financial incentive to avoid restrictive placements. Neither does the EHA create an incentive to seek restrictive placement. The cost to parents remains zero no matter where the child is placed. Moreover, the Act explicitly requires that placements be made in the least restrictive environment. *See Kruelle v. New Castle County School District*, 642 F.2d 687, 695 (3d Cir.1981); *Department of Education v. Katherine D.*, 531 F.Supp. 517, 525-27 (D.Haw.1982); *Kruelle v. Biggs*, 489 F.Supp. 169, 174 (D.Del. 1980), *aff'd sub nom. Kruelle v. New Castle County School District*, 642 F.2d 687 (3d Cir. 1981); 20 U.S.C. § 1412(5) (1976).[11]

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[9] Were the question a close one, we would have to certify it to the Attorney General of the United States under 28 U.S.C. § 2403 (1976). However, it is not.

[10] It is far from clear that due process requires this. In its first encounter with this issue, the Supreme Court held only that due process prohibits restrictions on the freedom of the handicapped which are not reasonably related to their safety, training, or other legitimate non-punitive governmental interests. *See Youngberg v. Romeo*, ___ U.S. ___, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982).

[11] *See also Board of Educ. v. Rowley*, ___ U.S. ___, 102 S.Ct. 3034, 3049, 73 L.Ed.2d 690 (1982).

In short, once it is established that the EHA is valid and applicable, there is little question but that Illinois has violated it. The class we have certified consists of handicapped children clearly entitled to an education at no cost to their parents under federal law. The Illinois statutory scheme by which a "responsible relative liability" is assessed for what no one disputes are special education and related services within the meaning of the EHA is in the conflict with federal law, and is invalid under the supremacy clause. The Illinois Appellate Court has already held the statutory scheme by which DMHDD imposes a responsible relative liability unconstitutional, relying in large part on our earlier opinion. *See Parks v. Illinois Department of Mental Health and Developmental Disabilities*, 110 Ill.App.3d 184, 65 Ill.Dec. 695, 441 N.E.2d 1209 (1872). We agree and hereby grant plaintiffs' motion for partial summary judgment.

WHO IS LIABLE?

Defendants devote most of their memoranda to the arguing about which of them should be held liable for the failure of Illinois to comply with federal law. DMHDD contends that the EHA places the responsibility for compliance on ISBE, and that since only ISBE receives federal funds under the EHA, only ISBE should be held liable. ISBE claims that since it is DMHDD that placed Lester and most other persons for whom a responsible relative liability is assessed, and since it is DMHDD that actually assesses the responsible relative liability, DMHDD alone should be held responsible. GPCRB claims that it is not responsible, since all it does is set rates at which providers of special education and related services are paid. CBE argues that there is nothing in the record showing that it has a policy of not paying the responsible relative liability, so no relief should be entered against it.

All this finger pointing makes for a somewhat sorry spectacle. One point remains clear, however: the imposi-

tion of a responsible relative liability is violative of plaintiffs' federal civil rights. From this fact follows a corollary: where there is a right, there is a remedy. Plaintiffs' civil rights cannot be permitted to slip between the cracks simply because the state of Illinois has apportioned liability in a way that does not focus blame on a single agency.

ISBE, as the state educational agency,[12] is clearly responsible for Illinois' failure to comply with federal law. Under the EHA, it is responsible for ensuring compliance with the requirements of the Act. *See* 20 U.S.C. § 1412(6) (1976); 34 C.F.R. § 300.600. The ultimate responsibility is placed on the ISBE precisely to avoid an abdication of responsibility by other state agencies such as has occurred here. *See id.* Comment.[13] ISBE may not rely on other agencies, alleged derelictions, for the ultimate responsibility for assuring compliance with the EHA lies with it and it alone. DMHDD's answers to interrogatories establish that hundreds of families of handicapped children have been assessed responsible relative liabilities for services covered by the Act. No contention is made the ISBE or any other state agency paid these assessments. Thus, the education these children have received was not "free," and as a result, ISBE has breached the affirmative obligation placed on it by federal law to ensure that Illinois provides a free appropriate public education to handicapped children.

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[12] ISBE clearly qualifies as the state educational agency. *See* 20 U.S.C. § 1401(7) (1976).

[13] The comment is instructive. Referring to the rule that that state agency must bear ultimate responsibility, it states, "Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped children, sources of funding, and type of services delivered. . . . [T]he responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency." *Id.* (quoting Sen.Rep. No. 168, 94th Cong., 1st Sess. 24 (1975), *reprinted in* 1975 U.S.Code Cong. & Ad.News 1425, 1448).

DMHDD is also liable. We have already held that the EHA applies to it. The fact that DMHDD receives no federal funds under the Act is no defense; 34 C.F.R. § 300.2 (b) (1981) explicitly states that the Act applies to DMHDD. The comment continues,

> The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

Id. Comment. If DMHDD requires financial assistance to meet its obligations from ISBE, which does receive federal funds, a cost sharing arrangement may be used. *See id.* § 300.301(a).[14]

GPCRB is also liable. Under state law, it must approve costs of and facilities for special education, and establish guidelines for coordination of financial assistance to assure that no handicapped child is denied the benefits of any state program. *See* Ill.Rev.Stat. ch. 122, ¶ 14-7.02 (1981). However, it remains bound by the provisions of the Mental Health and Developmental Disabilities Code providing for a responsible relative liability. *See id.* Thus, it too is involved in the education of handicapped children within

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[14] DMHDD and GPCRB rely on *Kruelle v. Biggs*, 489 F.Supp. 167, 174 (D.Del.1980), *aff'd sub nom. Kruelle v. New Castle County School Dist.*, 642 F.2d 687 (3d Cir.1981) in support of their contention that only ISBE is liable. There, the court imposed liability on the state educational agency. However, the court nowhere stated that other state agencies involved in the education of handicapped children were not liable. All it did was place ultimate responsibility for compliance with federal law on the state educational agency, as the appellate opinion in the case made clear. *See* 642 F.2d at 696-97. The same may be said of defendants' reliance on *North v. District of Columbia Bd. of Educ.*, 471 F.Supp. 136, 139-40 (D.D.C.1979). In any event, these defendants do not attack the validity of 34 C.F.R. § 300.2(b) (1981), which explicitly applies the EHA to them.

the meaning of 34 C.F.R. § 300.2(b) (1981) and is part of the structure by which a responsible relative liability is assessed.

CBE, in its answer to the amended complaint, denies the existence of a policy of not paying the responsible relative liability assessed by DMHDD. However, it carefully refrains from affirmatively stating that it does pay the assessments. Nor does it submit affidavits or other evidentiary materials in support of its denial.

In Lester's case, CBE did refuse to pay the assessment. Administrative Record 514. CBE concedes as much. Yet, presumably the CBE hearing officer's ruling was not an arbitrary or freakish happenstance, but the product of some policy or practice. At least we think the facts of Lester's case raise an inference that CBE does not customarily pay the liability.[15]

Moreover, CBE takes the position that it is "precluded" from making any payments for the education of handicapped children which are not authorized by Ill.Rev.Stat. ch. 122, ¶ 14-7.02 (1981). *See* Certain Defendant's Responses to Plaintiff's Motion for Partial Summary Judgment at 2. Yet, the final paragraph of that statute incorporates the provisions of the Mental Health and Developmental Disabilities Code which state that the responsible relatives are liable for a portion of costs. Thus, by CBE's own reasoning, it is precluded from paying DMHDD-assessed responsible relative liabilities. In fact, we have examined the entire School Code in an attempt to find some statutory authority for CBE to pay responsible relative liabilities, and have found none. It appears that Illinois law does not permit CBE to pay these costs.[16]

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[15] Moreover, DMHDD's answers to interrogatories state that a responsible relative liability is assessed and placements are not fully funded even where the child receives "LEA" (local educational agency) funds.

[16] Thus, even if CBE wishes to pay the assessments, it may require the aid of a federal injunction to secure it against the risk that its payments are not proper under state law.

In light of the preceding, and CBE's failure to submit any evidentiary material indicating that it pays the DMHDD assessments, we think that a fair inference has been raised that CBE does not pay the assessments which has not been rebutted by specific facts supported by affidavit or otherwise as required by Fed.R.Civ.P. 56(e). Plaintiffs are entitled to partial summary judgment against CBE.[17]

In sum, all the defendants are obliged to provide plaintiffs with a free appropriate public education. That duty has been breached, and all are liabile. We need not, at this juncture, sort out exactly which agency or agencies will pay the assessments or how this will be done.[18] It is enough that we assign to ISBE the ultimate responsibility for coordinating compliance with federal law in the final decree that we issue, as the Third Circuit has recognized.

> By placing the burden for coordinating efforts and financial arrangements for [plaintiffs'] education on

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[17] We are disturbed that CBE has denied the existence of a policy of not paying the assessments, yet failed to affirmatively state that it does not pay the assessments and submit affidavits in support of the claim. If CBE actually does pay the assessments, it should be easy for it to obtain affidavits to that effect. If it does, we will gladly reconsider our ruling. However, we are disinclined to force plaintiffs to trial unless and until CBE does make an affirmative statement of its policy, supported in the manner required by rule 56.

[18] *Cf. United States v. Board of School Commissioners*, 677 F.2d 1185, 1194 (7th Cir.) (Posner, J., dissenting) ("[R]ather than get into the tangled and recriminatory business of who shall pay for this court-ordered busing, we should say: 'This litigation ended, at long last, when the district court's busing order was upheld . . . . Let the State of Indiana worry about who shall bear the costs of complying with the order. It is not a matter for the federal courts unless the state should devise a method of financing that discriminates against black people who are the intended beneficiaries of the order. Other than in a purely technical sense there is no federal question before us today.' "), *cert. denied*, ____ U.S. ____, 103 S.Ct. 568, 74 L.Ed.2d 931 (1982).

> the State Board of Education, the trial judge was both reflecting legislative intent and appropriately observing the limits of his institutional role. Rather than rigidly prescribe for the state how various local and state agencies should contribute to the provision of a free education for [plaintiffs], the federal court left such interactions to the discretion of the state officials involved.

Kruelle v. New Castle County School District, 642 F.2d 687, 697 (3d Cir.1981).

All defendants are liable and will be bound by our final decree. We will dictate no specific mode of compliance to them, but merely order ISBE to assume ultimate responsibility for developing a plan that complies with federal law.

APPROPRIATE RELIEF

There is no dispute that if defendants are liable, final injunctive relief against the assessment of a responsible relative liability would be appropriate.

In our earlier opinion, we concluded that plaintiffs may also obtain reimbursement of past charges assessed against them, since the EHA abrogates defendants' eleventh amendment immunity. *See* 536 F.Supp. at 306-11. *Accord, Department of Education v. Katherine D.*, 531 F.Supp. 517, 528-31 (D.Haw.1982). *Contra, Matthews v. Ambach*, 552 F.Supp. 1273, 1280-81 (W.D.N.Y.1982).

In their motion to reconsider the granting of a preliminary injunction, the state defendants argued that *Board of Education v. Rowley*, ___ U.S. ___, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) is to the contrary. They relied on dicta in the case, specifically two footnotes, *id.* at 3042 n. 11, 3049 n. 26. In those footnotes the Court rejects a claim that the EHA can be read to impose a duty on the states to maximize the educational potential of handicapped children because Congress, "when exercising its spending power," can impose no burden on the states

unless it does not unambiguously. Defendants contend that this demonstrates that the Act was passed pursuant to Congress' article I spending power, rather than its power to enforce the fourteenth amendment. A finding that the Act was passed pursuant to U.S. Const. amend. XIV, § 5 was a necessary predicate to our conclusion that the Act abrogates the states' eleventh amendment immunity from suits for damages. *See* 536 F.Supp. at 306-07.

In making this argument, state defendants[19] overlook the context of the footnotes on which they rely. These footnotes respond to a claim that the Act requires that each handicapped child's educational potential be maximized. The Court noted that such a claim could not be based on the fourteenth amendment, since the cases construing that constitutional provision on which Congress relied in writing the Act had not recognized a right to "maximized" potential. *See* 102 S.Ct. at 3043-44 & n. 15, 3047-48. Thus, to the extent that Ms. Rowley sought to go further and assert such a right, it could only be based on the spending power. That is why the Court referred to her claim as based on an article I power. However, when the Court referred to the core right to a free appropriate public education, it did recognize that that statutory right had its genesis in the congressional power to enforce the fourteenth amendment. The Court recognized that the cases which established a fourteenth amendment right to education on behalf of handicapped children and "the principles that they established are the principles which, to a significant extent, guided the drafters of the Act." *Id.* at 3044. The Court acknowledged that the Act was designed to effectuate the principles of these constitutionally-based cases. *See id.* at 3043-44 & n. 18. The Court went on to observe, "Respondents and the United States correctly note that Congress sought 'to provide

[19] CBE, through defendant Love, does not make this argument, presumably because it does not enjoy an eleventh amendment immunity under any circumstances. *See* 536 F.Supp. at 306 n. 18.

assistance to the States in carrying out their responsibilities under . . . the Constitution of the United States *to provide equal protection of the laws.'* " *Id.* at 3046-47 (emphasis supplied) (quoting Sen.Rep. No. 168, 94th Cong., 1st Sess. 13 (1975), *reprinted in* 1975 U.S.Code Cong. & Ad.News 1425, 1437[20]). The Court characterized the Act as a "legislative conception of the requirements of equal protection," *id.* at 3047, designed "to provide a 'basic floor of opportunity' consistent with equal protection," *id.* The Court concluded that the Act and its history reflects Congress' belief that equal protection required that handicapped children receive meaningful access to a free appropriate public education, though no more. *Id.* at 3047-48. *See also id.* at 3053 (Blackmun, J., concurring in the judgment).

Here, plaintiffs do not seek to have the educational potential of handicapped children "maximized," but only to obtain access to the "free" education guaranteed by the Act. Thus, what plaintiffs seek is not the sort of claim that can only be based on the spending power, but rather is the "free" education which *Rowley* acknowledges is itself a "legislative conception of the requirements of equal protection." As such, plaintiffs' claims arise from Congress' efforts to enforce the fourteenth amendment. *Rowley* confirms our view that the Act was passed pursuant to the congressional power to enforce the fourteenth amendment.

As we noted in our earlier opinion, the EHA requires that we award plaintiffs "all appropriate relief." *See* 536 F.Supp. at 311. We concluded that an order requiring defendants to pay costs previously assessed would constitute appropriate relief. *See id.* at 312-13. We see no reason to depart from that conclusion. Plaintiffs do not seek unliquidated sums as "tort damages" caused by defendants'

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[20] We also cited this passage from the Senate Report in our earlier opinion. *See* 536 F.Supp. at 308.

conduct.[21] Rather, all they seek is the amounts assessed against them as responsible relative liabilities. Unless defendants reimburse them for these amounts, there is no way plaintiffs' right to a free appropriate public education can ever be vindicated. We conclude that an order requiring defendants to reimburse plaintiffs for costs they have incurred since February 18, 1977 would constitute appropriate relief in this case.[22]

CONCLUSION

To summarize, plaintiffs' motions for class certification and partial summary judgment are granted. Defendants' policies of leaving unpaid responsible relative liability assessments violates federal law. Defendants will be permanently enjoined from leaving these assessments unpaid in the future. Defendants will also be permanently enjoined to calculate and pay to each family in the plaintiff class, or, where the family has not paid the assessment, to the provider who has been left unpaid, all responsible

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[21] If they did, this would be a different case. Tort damages can never be appropriate relief. *See Anderson v. Thompson*, 658 F.2d 1205, 1213 & n. 12 (7th Cir.1981); *William S. v. Gill*, 536 F.Supp. 505, 512 (N.D.Ill.1982); *Gregg B. v. Board of Educ.*, 535 F.Supp. 1333, 1339 (E.D.N.Y.1982); *Ruth Anne M. v. Alvin Indep. School Dist.*, 532 F.Supp. 460, 465 (S.D.Tex. 1982).

[22] The parties appear to agree that February 18, 1977 is an appropriate date to use as the starting date for a reimbursement order. In addition to those authorities contained in our earlier opinion which support entry of a reimbursement order, *see Matthews v. Ambach*, 552 F.Supp. 1273 (W.D.N.Y.1982); *Calhoun v. Illinois State Bd. of Educ.*, 550 F.Supp. 796, 803 (N.D.Ill. 1982); *William S. v. Gill*, 536 F.Supp. 505, 511-12 (N.D.Ill.1982); *Gregg B. v. Board of Educ.*, 535 F.Supp. 1333, 1338-39 (E.D.N.Y.1982); *Department of Educ. v. Katherine D.*, 531 F.Supp. 517, 528-31 (D.Haw.1982). However, children ages 3-5 and 18-21 should only receive relief for costs incurred during periods when children of these ages were guaranteed a free education under state law. *See* 20 U.S.C. § 1412(2)(B) (Supp. V 1981).

relative liability amounts charged since February 18, 1977. Plaintiffs are to submit a draft decree on notice to defendants.[23]

[23] As we stated earlier, the draft decree should apply to all defendants, but should place on ISBE the ultimate responsibility for devising a mechanism to coordinate compliance with the decree. However, the decree should do no more than order defendants to pay the responsible relative liability. The specific method by which payments are made should be left to defendants' discretion, at least in the first instance.

At the time we enter the permanent injunction, we will address the question whether the judgment we enter should be made final under Fed.R.Civ.P 54(b).

APPENDIX C

110 Ill.App.3d 184
65 Ill.Dec. 695

Richard PARKS, Marilyn Parks and Lester Parks by his next best friend Richard Parks, Plaintiffs-Appellees,

v.

ILLINOIS DEPARTMENT OF MENTAL HEALTH AND DEVELOPMENTAL DISABILITIES, Defendant-Appellant.

No. 81-3084.

Appellate Court of Illinois,
First District, First Division.
Oct. 18, 1982.

Parents of handicapped child appealed from order of the Department of Mental Health and Developmental Disabilities which assessed a responsible relative liability charge against them for the residential placement of their handicapped child. The Circuit Court, Marjan P. Staniec, J., reversed the Department, and the Department appealed. The Appellate Court, Goldberg, J., held that: (1) federal Education for All Handicapped Children Act precluded state from assessing responsible relative liability charges; (2) the Department, not only the State Board of Education was bound by the federal law; and (3) State Board of Education was not a necessary party.

Affirmed.

* * *

GOLDBERG, Justice:

Richard and Marilyn Parks, parents, and Lester Parks, their son, by his next friend, Richard Parks (plaintiffs), filed this action seeking judicial review of an administrative decision rendered by the Illinois Department of Mental Health (defendant). (Ill.Rev.Stat.1981, ch. 110, par. 264

et seq.) Defendant had ruled that the assessment of a responsible relative liability charge against plaintiffs for the care of Lester Parks, a handicapped child diagnosed as autistic, was mandated by section 5-105 of the Mental Health and Developmental Disabilities Code (Ill.Rev.Stat. 1979, ch. 91½, par. 1-100 *et seq.*) hereinafter Code. The trial court found this decision was in violation of the Education for All Handicapped Children Act of 1975 (20 U.S.C. §§ 1401 *et seq.* (1976)) hereinafter EAHC. Defendant appeals.

The facts are not in dispute. Plaintiff Lester Parks, now approximately 17 years old, is a multihandicapped child. In 1975 it was determined he required residential placement. On February 16, 1976, defendant placed Lester at the New Hope Living and Learning Center in Waterloo, Illinois. The propriety of this placement is not questioned.

On August 1, 1979, defendant notified Richard and Marilyn Parks that, effective July 1, 1979, a responsible relative liability charge of $100 per month would be assessed against them. (Ill.Rev.Stat.1979, ch. 91½, par. 5-105.) Plaintiffs appealed from this assessment. After a hearing, the assessment was affirmed. On further appeal to the State of Illinois Board of Reimbursement Appeals, the assessment was again affirmed.

On administrative review, the trial court ruled the assessment of liability against the parents of a handicapped child for the cost of a residential placement that is necessary to meet the child's educational needs is a violation of section 612 of the EAHC (20 U.S.C. § 1412 (1976)) and regulations thereunder (45 C.F.R. § 121a.2, § 121a.301(a) and § 121a.302 (1980)). The trial court ruled the State must pay for all placements educationally necessary and must bear all costs incurred therein under the above cited authorities. The trial court further ruled, since defendant must bear these costs, it was unnecessary to remand the case for a determination of which costs of the placement are "educational."

In this court, defendant contends it is not precluded from charging parents of a handicapped child a responsi-

ble relative liability pursuant to section 5-105 of the Code (Ill.Rev.Stat.1979, ch. 91½, par. 5-105). Defendant also contends the trial court went beyond the scope of judicial review when it found all costs associated with the child were for educational purposes.

In our opinion, the ruling by the trial court is completely supported by Federal law. It is undisputed Lester Parks is a handicapped child and Federal law requires maintenance by the State of "a policy that assures all handicapped children the right to a free appropriate public education" (20 U.S.C. § 1412(1) (1976)). Such education is to include both "special education" and "related services" (20 U.S.C. § 1401(18) (1976)). The EAHC defines "special education" to be (20 U.S.C. § 1401(16) (1976)):

> "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction and instruction in hospitals and institutions."

The EAHC defines "related services" to include (20 U.S.C. § 1401(17) (1976)):

> "transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children."

With respect to residential placement of a handicapped child, the regulations promulated to enforce the EAHC provide (45 C.F.R. § 121a.302 (1980)):

> "If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including nonmedical care and room and board, must be at no cost to the parents of the child.

> "*Comment.* This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind."

Defendant contends these statutes and regulations should not prevent the State of Illinois from assessing responsible relative liability charges pursuant to section 5-105 of the Code (Ill.Rev.Stat.1979, ch. 91½, par. 5-105). We disagree. In our opinion, the regulations cited above unequivocally establish residential placement for the purpose of special education and also all related services are to be provided free from cost to the parents. The above excerpts from the Code and the regulations illustrate graphically the strong insistence by Federal law in the requirement that all expenditures of every kind for the education and welfare of the child are to be borne not by the parents but by the educational authorities of the State.

Under the doctrine of preemption as derived from the United States Constitution (U.S. Const., art. VI, § 2), a state law in conflict with Federal statutes and regulations "is nullified to the extent that it actually conflicts with [F]ederal law." (*Fidelity Federal Savings & Loan Association v. de la Cuesta* (1928), ____ U.S. ____, ____, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664. See also *Olsen v. Financial Federal Savings & Loan Association* (1982), 105 Ill. App.3d 364, 366-67, 61 Ill.Dec. 253, 434 N.E.2d 406, and cases there cited). Thus, the imposition of the responsible relative liability charge by defendant cannot stand in view of the express language of the Federal statutes and regulations.

Our view is supported by the recent ruling in *Parks v. Pavkovic* (N.D.Ill.1982), 536 F.Supp. 296. In *Parks*, the same plaintiffs as in the instant case filed suit to enjoin the instant defendant and other State agencies from discharging plaintiff Lester Parks from a residential facility because of the failure of his parents to pay the responsible relative liability charges for 1980 and 1981. In grant-

ing the plaintiffs' request for a preliminary injunction, the district court addressed the question of whether these costs may be imposed upon the plaintiffs. The court stated (536 F.Supp. 296, 304):

> "There is no dispute that the outstanding bill for services provided to Lester * * * involves the provision of special education and related services. There is also no dispute that placement * * * was necessary * * * in order to provide Lester with special education and related services. This being the case, the unambiguous mandate of [F]ederal law is that these services be provided at no cost to Lester's parents. While defendants' refusal to meet fully Lester's expenses may be authorized by state law, such laws are inconsistent with the mandate to provide an appropriate free public education, and cannot stand. [Citations.]"

In adopting the reasoning of the district court, we are mindful the analysis was limited to the probability of the plaintiffs' eventual success on the merits and therefore does not have the *res judicata* effect of a final order. However, the reasoning and the authorities cited therein are so persuasive we find no difficulty in relying upon the pertinent and well stated opinion of the district court. *Parks*, 536 F.Supp. 296, 304-05.

Defendant contends it does not have the authority to provide the relief sought by plaintiffs. Defendant argues only the Illinois State Board of Education (ISBE) is authorized to educate handicapped children. Defendant refers to 20 U.S.C. § 1412(6) (1976), which states the requirements of the Act are to be administered by the "[S]tate educational agency." Therefore, urges defendant, plaintiffs must obtain their relief exclusively from the ISBE.

We cannot agree. The regulations state the EAHC extends (34 C.F.R. § 300.2(b) (1981)):

> "to *all* political subdivisions of the State that are involved in the education of handicapped children. These would include:

> "(1) The State educational agency,
>
> "(2) local educational agencies and intermediate educational units,
>
> "(3) other State agencies and schools (*such as Departments Mental Health and Welfare* and State schools for the deaf or blind), and
>
> "(4) State correctional facilities." (Emphasis added.)

We believe it cannot be seriously asserted defendant is not "involved in the education of handicapped children" in view of the facts of this case and the *Parks* decision in the district court. We are therefore impelled to conclude the EAHC is binding on defendant as it is upon all other educational agencies of Illinois. In *Parks*, 536 F.Supp. 296, 304, the court held:

> "Under the EHA, while the ultimate responsibility for assuring compliance with [F]ederal law rests with ISBE, see 34 C.F.R. § 300.600 (1981), the Act's requirements also apply to all other state and local departments involved with the education of handicapped children. [34 C.F.R. § 300.2(b) (1981).]"

The original brief filed by defendant stated that the hearing officer pointed out that the ISBE is responsible for the administration of EAHC. The brief then quoted from the EAHC to the effect that the ISBE was responsible for carrying out the Federal programs. (20 U.S.C. § 1412 (1976).) However, defendant's reply brief contains an elaborate argument to the effect that the ISBE is a necessary party to these proceedings. We reject this contention.

The original brief did not pursue and advance this theory with citation of authorities. Therefore, it has been waived. (*Saldana v. Wirtz Cartage Co.* (1978), 74 Ill.2d 379, 386, 24 Ill.Dec. 523, 385 N.E.2d 664.) The applicable rules provide that the reply brief is to be "confined strictly to replying to arguments presented in the brief of the appellee * * *." (73 Ill.2d R. 341(g).) We conclude that the matter has been waived and was improperly raised

in defendant's reply brief. *Department of Transportation v. Drobnick* (1977), 54 Ill.App.3d 987, 993, 12 Ill.Dec. 619, 370 N.E.2d 242, *leave to appeal denied,* 71 Ill.2d 597.

In addition, on the merits of the situation, plaintiffs did not commence this litigation. The defendant made demand upon plaintiffs for payment of money and brought plaintiffs into a proceeding conducted by defendant in an effort to collect certain assessments. Plaintiffs were then obliged to proceed with administrative review. The necessary party argument has no place in this record.

We believe our ruling here to be in accordance with our decision in *In the Matter of the Special Education Placement of Steven Walker* (1982), 107 Ill.App.3d 1053, 63 Ill. Dec. 651, 438 N.E.2d 582. There, a disagreement arose between the parent of a handicapped child and the local school district concerning the educational placement of the child. While awaiting a hearing on this issue, the parent place the child in a private special educational facility. A subsequent hearing which resulted in a recommendation of residential placement was overruled by the Illinois Office of Education (IOE). The parent brought an action in administrative review. The trial court reversed the administrative decision and found the IOE liable for payment of all costs of the child's placement. On appeal, we affirmed. We specifically rejected the IOE's contention that Steven Walker received "only mainstream instruction" and not "special education" and "related services" at the institution. Based on the record before us, we concluded the services provided Steven Walker fell into the categories of "special education" and "related services" and must therefore be provided for him at no cost to his family. 107 Ill.App.3d 1053, 1060-61, 63 Ill.Dec. 651, 438 N.E.2d 582.

Defendant's second and final contention is that the trial court went beyond the scope of administrative review in its holdings. Defendant urges the court found all costs of Lester Parks' care were related to his education whereas no evidence as to this point was heard before the administrative body. Therefore, defendant requests the case be

remanded to a hearing officer so this question may be properly determined.

We do not agree. The trial court below did not find as a factual issue all costs for Lester Parks' care were related to his education. Rather, the trial court concluded as a matter of law that where residential placement was necessary for the education of the handicapped child, it was a violation of Federal law as set forth in EAHC and of its attendant regulations to assess the responsible relative liability charge against the parents. The trial court further held Federal law required defendant to pay the costs of "all placements that are educationally necessary, not only those placements that are 'solely for educational purposes.' " The trial court also found defendant erred as a matter of law in finding only the ISBE to be bound by the Federal statutes and regulations. These rulings by the trial court are all legal matters upon which the trial court properly ruled. Actually the only question of fact before the trial court was the propriety of Lester Parks' residential placement, which was never questioned by either party. This situation contrasts with the *Steven Walker* case where the type of educational services provided was an issue. Therefore, in the instant case, the trial court did not exceed its scope of review. Actually the trial court determined only issues of law in complete accordance with the pertinent statute (Ill.Rev.Stat.1981, ch. 110, par. 274), and with the decided cases. *Caterpillar Tractor Co. v. Department of Revenue* (1963), 29 Ill.2d 564, 566, 194 N.E.2d 257, as cited in *Cook County Masonic Temple Association v. Department of Revenue* (1982), 104 Ill.App.3d 658, 660, 60 Ill.Dec. 341, 432 N.E.2d 1240.

The judgment appealed from is accordingly affirmed.

Judgment affirmed.

CAMPBELL, P.J., and McGLOON, J., concur.

APPENDIX D

U.S. Const., art. VI, § 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

20 U.S.C. § 1400, 84 Stat. 175

§ 1400. Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Education of the Handicapped Act".

(b) Findings

The Congress finds that—

(1) there are more than eight million handicapped children in the United States today;

(2) the special education needs of such children are not being fully met;

(3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there are many handicapped children throughout the United States participating in regular school programs whose handicaps prevent them from hav-

ing a successful educational experience because their handicaps are undetected;

(6) because of the lack of adequate services within the public school system, families are often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of handicapped children;

(8) State and local educational agencies have a responsibility to provide education for all handicapped children, but present financial resources are inadequate to meet the special educational needs of handicapped children; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all handicapped children have available to them, within the time periods specified in section 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to educate handicapped children.

(Pub.L. 91-230, Title VI, § 601, Apr. 13, 1970, 84 Stat. 175, amended Pub.L. 94-142, § 3(a), Nov. 29, 1975, 89 Stat. 774).

20 U.S.C. § 1401, 97 Stat. 1357, 1358

§ 1401. Definitions

As used in this chapter:

(a) As used in this chapter—

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech or language impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

(2) Repealed. Pub.L. 98-199, § 2(2), Dec. 2, 1983, 97 Stat. 1357.

(3) The term "Advisory Committee" means the National Advisory Committee on the Education of Handicapped Children.

(4) The term "construction", except where otherwise specified, means (A) erection of new or expansion of existing structures, and the acquisition and installation of equipment therefor; or (B) acquisition of existing structures not owned by any agency or institution making application for assistance under this chapter, or (C) remodeling or alteration (including the acquisition, installation, modernization, or replacement of equipment) of existing structures; or (D) acquisition of land in connection with the activities in clauses (A), (B), and (C); or (E) a combination of any two or more of the foregoing.

(5) The term "equipment" includes machinery, utilities, and built-in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, telecommunications, sensory, and other technological aids and devices, and books, periodicals, documents, and other related materials.

(6) The term "State" means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

(7) The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public body of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

(11) The term "institution of higher education" means an educational institution in any State which—

(A) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(B) is legally authorized within such State to provide a program of education beyond high school;

(C) provides an educational program for which it awards a bachelor's degree, or provides not less than a two-year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(D) is a public or other nonprofit institution; and

(E) is accredited by a nationally recognized accrediting agency or association listed by the Secretary pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited: *Provided, however,* That in the case of an institution offering a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge, if the Secretary determines that there is no nationally recognized accrediting agency or association qualified to accredit such institutions, he shall appoint an advisory committee, composed of persons specially qualified to evaluate training provided by such institutions, which shall prescribe the standards of content, scope, and quality which must be met in order to qualify such institutions to participate under this Act and shall also determine which particular institutions meet such standards. For the purposes of this paragraph the Secretary shall publish a list of nationally recognized accrediting agencies or associations which he deter-

mines to be reliable authority as to the quality of education or training offered.

(12) The term "nonprofit" as applied to a school, agency, organization, or institution means a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(13) The term "research and related purposes" means research, research training (including the payment of stipends and allowances), surveys, or demonstrations in the field of education of handicapped children, or the dissemination of information derived therefrom including (but without limitation) experimental schools.

(14) The term "Secretary" means the Secretary of Education.

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems, which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive

services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, wherever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

(20) The term "excess costs" means those costs which are in excess of the average annual per student expen-

diture in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this subchapter or under title I or title VII of the Elementary and Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this subchapter or under such titles.

(21) The term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act.

(22) The term "intermediate educational unit" means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.

(b) For purposes of subchapter III of this chapter, "handicapped youth" means any handicapped child (as defined in subsection (a)(1) of this section) who—

(1) is twelve years of age or older; or

(2) is enrolled in the seventh or higher grade in school.

(As amended Pub.L. 98-199, §§ 2, 3(b), Dec. 2, 1983, 97 Stat. 1357, 1358.)

20 U.S.C. § 1415(a)

§ 1415. Procedural safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are

guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Ill. Rev. Stat. 1983, ch. 91½, § 5-105

5-105. Liability for charges—Responsible relatives—Exemptions

§ 5-105. Each recipient of services of the Department, and the estate of such recipient, is liable for the payment of sums representing charges for services to such recipient at a rate to be determined by the Department in accordance with this Act. If such recipient is unable to pay or if the estate of such recipient is insufficient, the responsible relatives are severally liable for the payment of such sums, or for the balance due in case less than the amount prescribed under this Act has been paid. The maximum services for each patient assessed against responsible relatives collectively may not exceed financial liability determined from income in accordance with Section 5-116 of this Act. Where the recipient is placed in a nursing home or other facility outside the Department, the Department may pay the actual cost of services in such facility and may collect reimbursement for the entire amount paid from the recipient, or an amount not to exceed those amounts determined under Section 5-116 from responsible relatives according to their proportionate ability to contribute to such charges. The liability of each responsible relative for payment of services charges ceases when payments on the basis of financial ability have been made for a total of 12 years for any recipient, and any portion of such 12 year period during which a responsible relative has been determined by the Department to be financially unable to pay any services charges must be included in fixing the total period of liability. No child is liable under this Act for services to a parent. No spouse is liable under this Act for the services to the other spouse who wilfully failed to contribute to the spouse's support for a period of 5 years immediately preceding his

admission. Any spouse claiming exemption because of such wilful failure to support during any such 5 year period must furnish the Department with clear and convincing evidence substantiating such claim. No parent is liable under this Act for the services charges incurred by a child after such child reaches the age of majority.

Amended by P.A. 83-578, § 1, eff. Sept. 17, 1983.

Ill. Rev. Stat. 1983, Ch. 91½, § 5-116

5-116. Standard and regulations for determining ability to support

§ 5-116. Standard and Regulations for Determining Ability to Support. The Department shall establish a standard by which shall be measured the ability of responsible relatives to provide support, and shall implement the standard by rules governing its application. The standard and the rules shall take into account the buying and consumption patterns of self-supporting persons of modest income, present or future contingencies having direct bearing on maintenance of the relative's self-support status and fulfillment of his obligations to his immediate family, and any unusual or exceptional circumstances including estrangement or other personal or social factors, that have a bearing on family relationships and the relative's ability to meet his support obligations. The standard shall be recomputed periodically to reflect changes in the cost of living and other pertinent factors.

Amended by P.A. 83-578, § 1, eff. Sept. 17, 1983.

59 Ill. Admin. Code § 106.25

Section 106.25 Charges for services

a) The maximum charge for services to be assessed against a recipient, or the estate of a recipient in a Department-operated facility, shall be 55% of the average per capita cost commencing January 1, 1985; 65% of the average per capita cost commencing Jan-

uary 1, 1986; 75% of the average per capita cost commencing January 1, 1987; 85% of the average per capita cost commencing January 1, 1988; 95% of the average per capita cost commencing January 1, 1989; and 100% of the average per capita cost commencing January 1, 1990 and each January 1 thereafter to be recalculated annually.

b) The standard authorized by Section 5-116 of the Mental Health and Developmental Disabilities Code (Ill. Rev. Stat. 1983, ch. 91½, par. 5-116) by which the Department will set the rate for responsible relatives to provide support will be based on a percentage of annual income, considering the number of dependents. Table A, found at the end of this Part, is used for determining the support obligation of a responsible relative.

c) The maximum rate to be used when filing claims for benefits under Title XVIII of the Social Security Act (Medicare), (42 U.S.C.A. 1395b-1, et seq., 1981), Title XIX of the Social Security Act (Medicaid) (42 U.S.C.A. 1396a et seq., 1983) Veteran's Administration benefits (38 U.S.C.A. 521, 541, 542, 1979), Champus/Champva (38 U.S.C.A. 601 et seq., 1981) and active military, is not to exceed the rate set by the Office of Health Finance, Department of Public Aid, or as approved each year for the respective program. Payments received from a benefit or federal insurance program shall be credited for the number of days of specified coverage prescribed by the program involved against the maximum per capita cost for which the recipient has a liability. Responsible relatives cannot be assessed a charge during periods such coverage is received.

d) All payments received from private hospitalization insurance shall be credited against the recipient's liability on a day-to-day basis at the prevailing maximum charge for recipients as established in this section.

e) All payments on behalf of recipients from any source shall be credited against Medicaid (42 U.S.C.A. 1396a et seq., 1983) billings if for the same period of service.

f) If a spouse who is a legal dependent of a recipient is designated as payee of the recipient's benefits and is using such benefits as his/her income, charges shall be established on the total combined income in accordance with the schedule in Table A as provided for in Section 5-116 of the Mental Health and Developmental Disabilities Code (Ill. Rev. Stat. 1983 ch. 91½, par. 5-116).

g) Voluntary payments in excess of required amounts will be accepted from the recipient and from responsible relatives as well as from persons not legally responsible.

(Source: Added at 8 Ill. Reg. 22555, effective November 7, 1984.)

59 Ill. Admin. Code § 106.85

Section 106.85 Computing costs of services charges of recipients

The liability of recipients, the estates of recipients and responsible relatives for services charges in Department mental health and developmental disabilities facilities shall be computed in the following manner:

a) When a recipient is in a Department facility for a full calendar month, the liability is determined by multiplying the per diem rate by the number of days in the month.

b) For any fraction of a month, the liability of a recipient shall be determined by multiplying the per capita rate by the number of days the recipient received services for the month.

(Source: Added at 8 Ill. Reg. 22555, effective November 7, 1984.)

TABLE A

Responsible Relative Liability

Number in Family (including recipient)

Annual Income Range		Family Size					
		2	3	4	5	6	7
$7,000	$ 7,500	$ 5					
7,501	8,000	10					
8,001	8,500	15					
8,501	9,000	20	$ 5				
9,001	9,500	25	10				
9,501	10,000	30	15				
10,001	10,500	35	20	$ 5			
10,501	11,000	40	25	10			
11,001	11,500	45	30	15			
11,501	12,000	50	35	20	$ 5		
12,001	12,500	55	40	25	10		
12,501	13,000	60	45	30	15		
13,001	13,500	65	50	35	20	$ 5	
13,501	14,000	70	55	40	25	10	
14,001	14,500	75	60	45	30	15	
14,501	15,000	80	65	50	35	20	$ 5
15,001	15,500	85	70	55	40	25	10
15,501	16,000	90	75	60	45	30	15
16,001	16,500	95	80	65	50	35	20
16,501	17,000	100	85	70	55	40	25
17,001	17,500	105	90	75	60	45	30
17,501	18,000	110	95	80	65	50	35
18,001	18,500	115	100	85	70	55	40
18,501	19,000	120	105	90	75	60	45
19,001	19,500	125	110	95	80	65	50
19,501	20,000	130	115	100	85	70	55
20,001	20,500	135	120	105	90	75	60
20,501	21,000	140	125	110	95	80	65
21,001	21,500	145	130	115	100	85	70
21,501	22,000	150	135	120	105	90	75
22,001	22,500	155	140	125	110	95	80
22,501	23,000	160	145	130	115	100	85
23,001	23,500	165	150	135	120	105	90

Annual Income Range		Family Size					
		2	3	4	5	6	7
23,501	24,000	170	155	140	125	110	95
24,001	24,500	175	160	145	130	115	100
24,501	25,000	180	165	150	135	120	105
25,001	25,500	185	170	155	140	125	110
25,501	26,000	190	175	160	145	130	115
26,001	26,500	195	180	165	150	135	120
26,501	27,000	200	185	170	155	140	125
27,001	27,500	205	190	175	160	145	130
27,501	28,000	210	195	180	165	150	135
28,001	28,500	215	200	185	170	155	140
28,501	29,000	220	205	190	175	160	145
29,001	29,500	225	210	195	180	165	150
29,501	30,000	230	215	200	185	170	155
30,001	30,500	235	220	205	190	175	160
30,501	31,000	240	225	210	195	180	165
31,001	31,500	245	230	215	200	185	170
31,501	32,000	250	235	220	205	190	175
32,001	32,500	255	240	225	210	195	180
32,501	33,000	260	245	230	215	200	185
33,001	33,500	265	250	235	220	205	190
33,501	34,000	270	255	240	225	210	195
34,001	34,500	275	260	245	230	215	200
34,501	35,000	280	265	250	235	220	205
35,001	35,500	285	270	255	240	225	210
35,501	36,000	290	275	260	245	230	215
36,001	36,500	295	280	265	250	235	220
36,501	37,000	300	285	270	255	240	225
37,001	37,500	305	290	275	260	245	230
37,501	38,000	310	295	280	265	250	235
38,001	38,500	315	300	285	270	255	240
38,501	39,000	320	305	290	275	260	245
39,001	39,500	325	310	295	280	265	250
39,501	40,000	330	315	300	285	270	255
40,001	40,500	335	320	305	290	275	260
40,501	41,000	340	325	310	295	280	265
41,001	41,500	345	330	315	300	285	270
41,501	42,000	350	335	320	305	290	275
42,001	42,500	355	340	325	310	295	280
42,501	43,000	360	345	330	315	300	285
43,001	43,500	365	350	335	320	305	290
43,501	44,000	370	355	340	325	310	295

Annual Income Range		Family Size 2	3	4	5	6	7
44,001	44,500	375	360	345	330	315	300
44,501	45,000	380	365	350	335	320	305
45,001	45,500	385	370	355	340	325	310
45,501	46,000	390	375	360	345	330	315
46,001	46,500	395	380	365	350	335	320
46,501	47,000	400	385	370	355	340	325
47,001	47,500	405	390	375	360	345	330
47,501	48,000	410	395	380	365	350	335
48,001	48,500	415	400	385	370	355	340
48,501	49,000	420	405	390	375	360	345
49,001	49,500	425	410	395	380	365	350
49,501	50,000	430	415	400	385	370	355
50,001 & over (continues at $5.00 increments)							

More than 7 in family (continues at $5.00 increments)

Annual income shall be adjusted gross income as defined in Section 2-203 of the Income Tax Act. (Ill. Rev. Stat. 1983, ch. 120, par. 2-203)

(Source: Added at 8 Ill. Reg. 22555, effective Nov. 7, 1984.)

45 C.F.R. § 121a.302 (1980)

§ 121a.302 Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including nonmedical care and room and board, must be at no cost to the parents of the child.

(20 U.S.C. 1412(2)(B); 1413(a)(4)(B))

Comment. This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind.

34 C.F.R. § 300.302 (1981)

§ 300.302 Residential placement

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including nonmedical care and room and board, must be at no cost to the parents of the child.

(20 U.S.C. 1412(2)(B); 1413(a)(4)(B))

Comment. This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind.

34 C.F.R. § 300.343(c) (1982)

§ 300.343 Meetings

(c) Other Handicapped Children. For a handicapped child who is not included under paragraph (b) of this section, a meeting must be held within thirty calendar days of a determination that the child needs special education and related services.

34 C.F.R. § 300.531 (1982)

§ 300.531 Replacement Evaluation

Before any action is taken with respect to the initial placement of a handicapped child in a special education program, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of § 300.532.

§ 300.532 Evaluation Procedures

State and local educational agencies shall insure, at a minimum, that:

(a) Tests and other evaluation materials:

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not possible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producer;

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure rather than reflecting the child's impaired sensory, manual or speaking skills (except where these skills are the factors which the test purports to measure);

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child; and

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability;

(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status and motor abilities.

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No. 84-1743

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

MICHAEL A. BELLETIRE, et al.,

Petitioners,

vs.

RICHARD PARKS, et al.,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED*/

1. Whether the decision of the Seventh Circuit Court of Appeals that it is a violation of the Education for the Handicapped Act to charge responsible relative liability and not pay the full cost of residential schooling for developmentally disabled children placed in residential settings pursuant to Individualized Education Programs, conflicts with decisions of other Circuit Courts of Appeal.

2. Whether the Seventh Circuit's decision that it is a violation of the Education for the Handicapped Act to charge respon-

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*/Respondents submit that these questions, rather than those phrased by the Petitioners, state more precisely the issues presented by the instant case and do so in a less argumentative and repetitious fashion. At the same time, these questions fully embrace the issues presented for this court's consideration in the Petition for Certiorari.

sible relative liability and not pay the full cost of residential schooling for developmentally disabled children placed in residential settings pursuant to Individualized Education Programs, conflicts Board of Education v Rowley, 458 U.S. 176 (1982).

PARTIES

The list of parties in the Petition for Certiorari omits two parties, who, because they have not joined in any petition for certiorari, should be listed as Respondents under Supreme Court Rule 19(6). These are Patricia Barger, representative of the Illinois Department of Mental Health to the Illinois Governor's Purchased Care Review Board, and Manford Byrd, Superintendent of the Chicago Public Schools (substituted for Ruth Love pursuant to Supreme Court Rule 40).

It should also be noted that the Respondents Richard Parks, Marilyn Parks, and Lester Parks, by his parents and next friends Richard Parks and Marilyn Parks, represent both themselves and a class of all persons similarly situated. This Brief in Opposition is submitted on behalf of all Respondents other than Barger and Byrd.

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No. 84-1743

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

MICHAEL A. BELLETIRE, et al.,

Petitioners,

vs.

RICHARD PARKS, et al.,

Respondents.

BRIEF IN OPPOSITION TO THE
PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Petition for a Writ of Certiorari does not mention the opinion of the district court on the motion for a preliminary injunction, despite the fact that the opinion on summary judgment and class certification incorporates portions of it by reference. The opinion is published at 536 F.Supp. 296 (N.D. Ill. 1982).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

In addition to the provisions set out in the Petition for a Writ of Certiorari, the following provisions are involved in this case:

20 U.S.C. § 1412

20 U.S.C. § 1415(e)

34 C.F.R. § 300.2

34 C.F.R. § 300.401

These are set forth in the Supplemental Appendix at SP-1.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is incomplete and, in some respects, inaccurate.

The State Court Litigation

Lester Parks is an autistic child, who was 15 years of age when the state court litigation Parks v. Illinois Department of Mental Health and Developmental Disabilities was begun. His level of mental development was, in some aspects, similar to that of an 18 month old. The Chicago Board of Education ("Chicago Board"), which had the responsibility for his public education, excluded him from the public schools when he was five. His mother searched for alternative educational settings for him, ultimately applying to the Illinois Department of Mental Health and Developmental Disabilities ("DMHDD"), on the Chicago Board's advice. The DMHDD placed Lester at New Hope Living

and Learning Center, in Waterloo, Illinois, with the Chicago Board's approval.

Because DMHDD had effectuated the placement, it left a responsible relative liability portion of the bill unpaid, $100 per month, pursuant to Ill. Rev. Stat., ch. 91 1/2, § 5-105.[1/] Had Chicago Board effectuated the placement without DMHDD's help, there would have been no charge. The Parks family exhausted DMHDD administrative procedures and ultimately initiated state court litigation to challenge the charge as a violation of the state's duty under the Education for the Handicapped Act, 20 U.S.C. §§ 1400, et seq. ("EHA"), to provide Lester a free, appropriate education. DMHDD admitted that Lester's placement was necessary for him to make educational progress,

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[1/] This was the maximum assessment. It applied to a family with an income of $15,600 a year. Parks v. Pavkovic, 753 F.2d 1397, 1400 (7th Cir. 1985).

but contended that since DMHDD did not receive EHA funds, it was not bound by the Act. The trial court found that DMHDD was bound by the Act pursuant to 34 C.F.R. § 300.2(b)(3), and barred DMHDD from assessing the responsible relative liability charge. This order was entered September 2, 1981.

DMHDD appealed, repeating its contentions. The Appellate Court affirmed on October 18, 1982. Parks v. Illinois Department of Mental Health And Developmental Disabilities, 110 Ill. App. 3d 184, 441 N.E.2d 1209 (1st Dist. 1982). DMHDD filed a petition for leave to appeal to the Illinois Supreme Court, which the Supreme Court rejected on February 1, 1983. No petition for certiorari was filed with this Court.

The Federal Court Litigation

While the state court litigation was pending, New Hope notified the parents

of children there that it was about to close. The Parks family requested that DMHDD and the Chicago Board of Education move Lester to a different placement. They did so, placing him in Willowglen Academy in Milwaukee. But because the state court action was an administrative review only of Lester's charges at New Hope, DMHDD refused to apply the court's decision to the new placement. The Parks family attempted to exhaust its remedies under the EHA to compel full payment for the placement, and a state hearing officer ordered the Chicago Board of Education to make full payment in the future, holding, however, that there was no administrative authority to authorize payment of back charges. The Chicago Board ignored the order. Appeals were filed to the Illinois State Board of Education, which failed to render any decision. The 30 days provided by federal

regulation for a decision passed. 34 C.F.R. § 300.512(b). Meanwhile, Willowglen issued a discharge notice.

The Parks family then filed the instant case in federal district court, asking for a preliminary injunction to pay the entirety of Lester's bill at Willowglen to keep him in school, and a classwide, permanent injunction to prevent the charging of responsible relative liability for similar children.[2/] A preliminary injunction was issued on March 19, 1982. Class certification and summary judgment were granted on February 28, 1983, and a class injunction was entered on June 22, 1983. The injunction was issued as a partial, final order under Fed. R. Civ. P. 54(b), because

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[2/] The Petition for Certiorari omits the statement of the basis for federal jurisdiction in the district court required by Supreme Court Rule 21 (1)(h). The basis is 28 U.S.C. §§ 1331(a) and 1343(c)(3), and 20 U.S.C. § 1415(e)(2).

other costs charged to parents (certain nursing and school health costs) are still the subject of litigation in the district court.

In the district court, the defendants broke into two groups, each blaming the other for a system where identical children would be given a free education or denied one on the basis of which state agency signed the placement papers. No distinction was raised between the children with responsible relative liability charges and those without, except for the agency doing the placement. Different defenses of the system emerged. Those defendants associated with the Illinois State Board of Education had no defense of responsible relative liability charges, but argued that no monetary remedy existed under the EHA, and that any there was would be barred by the eleventh amendment to the United States Constitution. Both

these arguments have been waived in the Petition for Certiorari. The defendants associated with the Illinois Department of Mental Health and Developmental Disabilities did defend the charges, saying that if the EHA required free residential placement, it was unconsitutional, because it eliminated the financial disincentive to residential placement that the responsible relative liability charges represented, and so led to restrictions of handicapped children's liberty. This argument was rejected by the district court as frivolous, and it was raised in neither the Seventh Circuit appeal nor the Petition for Certiorari.

The court certified the class and enjoined the defendants from leaving DMHDD responsible relative liability unpaid for handicapped children in private special education placements. "Special education placements" were distinguished

from other placements not covered by the injunction. The only placement covered by the injunction was to be a placement pursuant to an Individualized Education Program which provides for the placement. The court also required the defendants to pay the back liability charges or reimburse parents for them from September 1, 1978 forward.

The defendants appealed to the Seventh Circuit, arguing for the first time that the children whose placements carried responsible relative liability were a special category, those placed for reasons of "developmental disability." The defendants never denied that these placements were needed for these children to learn, and the definition of "developmental disability" they advanced led the court to conclude that this category of children had been placed for what, under the EHA, is an educational reason: these severely

developmentally delayed children needed residential placement to acquire basic life skills to live independently. The defendants repeated their arguments about remedies that they have now dropped. They also contended that the case was moot because Lester Parks's bill was paid in full, even though his parents were still under a bond to repay the state if the injunction were reversed, and the defendants' notice of appeal specifically included the preliminary injunction. This argument has now been dropped.

The Seventh Circuit panel ruled unanimously that the charges were unlawful, and affirmed the injunction, but modified the monetary relief ordered by the district court. It reversed the decision that the defendants had to reimburse parents for the amounts that they had wrongfully been required to pay to their children's

private schools. Its reasoning was that the EHA did not permit such an award of "damages." The portion of the remedial order that required public payment of parents' unpaid bills was affirmed, however, on the ground that it was not damages, but relief ancillary to the prospective injunction. No petition for rehearing was filed, and the mandate of the Seventh Circuit issued.

Contrary to the Petitioners' Statement of the Case, the notice adverted to at 11-12 was sent to the members of the class. It advised them to submit proof of indebtedness to the state for payment. No motion to say or recall the mandate has been filed, and final relief is now being implemented.

In the meantime, Lester Parks has made tremendous strides, and now has most of the skills and abilities of a child of six. He has completed Willowglen's

program. He lives in a group home for autistic adults, and contributes to his own support by working in a sheltered workshop.

SUMMARY OF ARGUMENT

1. Petitioners are trying to create a conflict between the Seventh Circuit Court of Appeals decision and the Third Circuit's decision in Kruelle v. New Castle County School District. These decisions are not in conflict. The Seventh Circuit relied on Kruelle in holding, consistently with all other federal courts that have considered the issue, that the state educational agency could not avoid its liability for funding the placement by arguing that the child has other, non-educational needs which might otherwise require residential placement. Under the facts of this case, where the Petitioners have conceded that the class members were residentially placed for reasons of developmental disability, Petitioners' attempted distinction between "educational" and "non-educational" reasons

for a residential placement is sheer sophistry. Furthermore, the Individualized Education Programs which were developed for each class member provide that a necessary component of the child's education is residential placement. Thus, under the EHA, these children are entitled to free residential schooling.

2. The decision of the Seventh Circuit is not inconsistent with Board of Education v. Rowley. The decisions of the courts below applied Rowley, and used standards consistent with that case in determining the nature and scope of relief.

3. Additional considerations counsel against review of this case. The Seventh Circuit's decision follows the decisions of the Illinois State courts. Petitioners' arguments constitute a challenge to the definition of the class, an issue on which the district court's decision is entitled to special deference.

ARGUMENT

I. THE SEVENTH CIRCUIT COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH THE THIRD CIRCUIT OPINION IN KRUELLE v. NEW CASTLE COUNTY SCHOOL DISTRICT.

The Seventh Circuit Court of Appeals correctly decided that the Illinois Department of Mental Health and Developmental Disability practice of charging responsible relative liability violates the requirement of the Education for the Handicapped Act, 20 U.S.C. § 1400, et seq. ("EHA"), that a free appropriate public education be provided for handicapped children who are placed in private residential placements pursuant to an Individual Education Program ("IEP"). Petitioners contend that this decision is somehow in conflict with the Third Circuit Court of Appeals decision in Kruelle v. New Castle County School District, 642 F.2d 687 (3d Cir. 1981), asserting that the Seventh Circuit provided relief to all

developmentally disabled children placed in residential placements pursuant to an IEP, without considering whether those placements were necessary for education or were "made for interdependent, non-segregable educational and non-educational reasons." Petition for Certiorari at 14. Petitioners also contend that the Seventh Circuit decision is incorrect because it did not examine whether each class member's placement was made for "educational" or "non-educational" reasons.

Petitioners seek to create conflicts among circuit courts where none exist in an attempt to secure this Court's review of the case. Further, Petitioners are confused about the Seventh Circuit's definition of those children who are class members and who are therefore entitled to relief.

A. Petitioners Manufacture an Intercircuit Conflict in an Attempt to Obtain This Court's Review.

The Third Circuit in Kruelle v. New Castle County School District, 642 F.2d 687 (3d Cir. 1981), held that the District Court was justified in holding that a residential placement was necessary for the plaintiff to be educated, and that the state educational agency could not avoid its liability for funding the placement by arguing that the child has other, non-educational needs which might independently require residential placement. Federal courts have consistently found that residential placements are covered by the EHA. See, e.g., Burlington School Committee v. Department of Education, 53 U.S.L.W. 4509, 4510 (U.S. 1985); Papacoda v. State of Connecticut, 528 F. Supp. 68, 71 (D. Conn. 1981). The Seventh Circuit's conclusion that Illinois is

liable for room and board is consistent with Kruelle and with other federal court decisions which have considered the matter of a state's responsibility for providing a free appropriate public education for residentially placed children.

The rationale of the Seventh Circuit on this issue is also consistent with Kruelle and the other federal courts. Both the Seventh Circuit in Parks and the Third Circuit in Kruelle recognized the educational need for residential placements. The Kruelle court looked at the placement in the context of an individual case; the Parks court looked at the placements in the context of a class action by acknowledging that IEP's which provide for residential placement of developmentally disabled children as part of an educational program constitute placements necessary for education.

Petitioners do not indicate any inconsistency between the language of Kruelle and of Parks because it is impossible to do so. Judge Posner relied on Kruelle in reaching his conclusion that Illinois is liable for those residential placements required by an IEP. Parks, 753 F.2d at 1405-06, Appendix to Petition for Writ of Certiorari ("Appendix") A-13. Judge Posner, in one of three illustrative examples, describes a child who "must be institutionalized for educational reasons but equally for medical reasons." Parks, 753 F.2d at 1405, Appendix A-12-13. This demonstrates the Kruelle unseverability standard. Kruelle, 642 F.2d at 693-94. See also North v. District of Columbia Board of Education, 471 F. Supp. 136, 141 (D.D.C. 1979) (free placement in residential program required where court found social, emotional, medical and educational problems so inter-

twined that it could not perform "the Solomon-like task of separating them"). Thus, the Seventh Circuit decision does not conflict with Kruelle, but instead reaffirms it.

Petitioners incorrectly suggest that Judge Posner's example of an uneducable, comatose child is equivalent to a Seventh Circuit holding that "Illinois... pay the room and board expense for all handicapped children in Illinois between the ages of three and twenty-one who are in private residential placements." Petition for Certiorari at 13 (emphasis in original)(footnote omitted). Judge Posner gave an example of a child whose placement would not be called for by his or her IEP and for whom, therefore, the state would not be required to pay room and board. Room and board in that instance would not be an educational expense. Judge Posner's one example

does not constitute the court's holding. It was merely a tool he used to focus in on the issue before the court. Parks, 753 F.2d at 1404-05, Appendix at A-11-13. That example does not illustrate the only case in which the state would not be liable for room and board expense, as Petitioners assume. This example and the rest of Judge Posner's rationale and conclusion are perfectly consistent with Kruelle. Therefore, the Seventh Circuit's opinion in Parks does not create an intercircuit conflict which this Court should consider resolving.

B. Petitioners' Distinction Among Class Members Is Meaningless Because Illinois Children Placed for Developmental Disability Reasons Pursuant to an IEP Are So Placed in Order to Be Educated.

Petitioners do not deny that all residential placements made solely by traditional education agencies should be free of charge to parents. Petitioners also seem to say that at least some DMHDD placements should be free. But they argue that others -- those not necessary for education -- should not be free.

Petitioners, however, conceded before the Seventh Circuit that all class members are placed by the DMHDD for developmental disability reasons. Parks, 753 F.2d at 1400-01, and 1405-06, Appendix at A-2-4 and A-13-14. The Seventh Circuit correctly pointed out that children who are "developmentally disabled" under Illinois law are also "handicapped children" whose handicaps entitle them to

special education under the EHA. Compare Ill. Rev. Stat., ch. 91 1/2, § 1-106 (1984 supp.) and 20 U.S.C. § 1401(a)(1) (1984 supp.). "Developmental disability, far from being an exempted category, is an important subcategory of the handicaps covered by the [EHA]." Parks, 753 F.2d at 1406, Appendix at A-13.

Thus, an Illinois child who is placed in a residential program because he is developmentally disabled is so placed because of his need to be educated just as much as the child who is otherwise classified as handicapped. Petitioners' attempted distinction is based on a mere semantic difference: whether an Illinois child is classified as "developmentally disabled" or "handicapped" changes the label without changing the nature of the need for residential placement. As Judge Posner pointed out, the essential meaning of the term "developmentally

disabled" under state law is "mentally retarded;" the whole purpose for residential placement of such a child is education. Id.

Petitioners cannot defend their position by saying that there are "non-educational reasons" for the placement of some developmentally disabled children. The "reasons" for residential placements are not the proper inquiry under the Act. The proper inquiry is whether residential placement is necessary for the child to learn, 34 C.F.R. § 300.302, or by extension, whether the placement serves educational purposes. Comment, 34 C.F.R. § 300.302. Indeed, federal courts around the country are unanimous in determining that a state cannot avoid its obligations under the EHA by showing that a child would have to be institutionalized apart from the educational needs

which required institutionalization.[1/] See Parks, 753 F.2d at 1406, Appendix at A-13: Kruelle, 642 F.2d 687; Gladys J. v. Pearland Independent School District, 520 F. Supp. 869 (S.D. Tex. 1981). See also Stark, Tragic Choices in Special Education: The Effect of Scarce Resources on the Implementation of Pub. L. 94-142,

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[1/] Petitioners agree that the IEP does not state the "reasons" for a residential placement. Petition for Certiorari at 7, n. 1. Petitioners then argue that some residential placements are made for non-educational reasons, citing State Board of Education Rule 8.03, which states that representatives of other state agencies are to be invited to the multidisciplinary conference which develops the IEP when a residential placement is contemplated for reasons primarily other than education. However, the fact that representatives of other agencies may attend the multi-disciplinary conference does not mean that the IEP which is developed is "non-educational". By definition of the IEP that cannot be true. See infra at 29. Further, State Board of Education Rule 8.03 does not absolve the state of its responsibility under federal law to provide free of charge those residential placements developed pursuant to an IEP.

14 Conn. L. Rev. 477, 514 (1982) ("Federal courts have uniformly rejected education agency attempts to distinguish emotional, or therapeutic, or parenting, or medical needs from educational needs and thereby avoid fiscal responsibility for necessary residential programs." [emphasis added]).[2/]

[2/] Petitioners refer this Court for guidance to Professor Stark's explanation of what should be considered an "educational" placement. But as Professor Stark makes clear in his article, Petitioners' position is contrary to (1) the overwhelming majority of federal courts that have considered the issue, (2) the plain language of the EHA and its regulations and (3) the key EHA objectives of reparation for the severely disabled and nondiscriminatory treatment among different disability groups. Stark, 14 Conn. L. Rev. at 514-518. The other article to which Petitioners refer this Court suggests the analysis adopted by Petitioners in their Petition for Certiorari. Mooney & Aronson, Solomon Revisited: Separating Educational and Other than Educational Needs in Special Education Residential Placements, 14 Conn. L. Rev. 531 (1982). See Petition for Certiorari at 14, n. 4. However, this suggested analysis is only a proposal by the authors rather than a statement of current law. In fact, the authors acknowledge that the Kruelle decision is at odds with their proposed analysis. The current standard is that stated by Judge Posner in Parks v. Pavkovic, 753 F.2d 1397 (7th Cir. 1985), and is not in conflict with decisions on the same issue in any other Circuit.

The District Court for the Northern District of Illinois, the Seventh Circuit Court of Appeals, and all Illinois state courts that have heard the issue have unanimously found that the State of Illinois is liable for room and board charges for Lester Parks and other class members. Indeed, Petitioners conceded in the Seventh Circuit that assessing the charge for Lester Parks violated the EHA. 753 F.2d 1397, 1403-1404, Appendix at A-8-9. Yet they present no basis to challenge the finding of the district court, made on the basis of uncontested affidvits, that Lester's case is fully typical of that of other class members. See Fed. R. Civ. P. 52(a). There is no intercircuit conflict here. Petitioners misconstrue both Parks and Kruelle in an attempt to create a conflict between the two opinions.

C. Only Those Children Whose Residential Placements Are Required by an IEP Are Entitled to Relief Under the Seventh Circuit's Decision.

The Seventh Circuit correctly affirmed the district court's grant of relief, which is limited to those children who receive special education or related services pursuant to an IEP which requires the residential placement. The IEP determines when a residential placement is necessary for education.

An IEP is a statement by the school district or other public agency that this program is what the child must have in order to learn. An IEP must be developed before a child can begin an educational placement, whether the placement recommended is public or private. 34 C.F.R. § 300.342; 34 C.F.R. § 300.347. The IEP determines what program components are necessary to provide a child with

a free appropriate public education. 20 U.S.C. § 1401(18); 20 U.S.C. § 1401(19); 34 C.F.R. § 300.346. See Board of Education v. Rowley, 458 U.S. 176, 203-204 (1982). Residential placement, with room and board provided at no cost to parents, is one such educational program component which may be provided for in an IEP. 34 C.F.R. § 300.302. An IEP that requires a residential placement reflects a decision by the school district or the state agency that a residential placement is necessary for this child to be educated.

Petitioners seem to contend that more intense scrutiny of each developmentally disabled child's IEP is needed to indicate which children were "educationally" or "non-educationally" placed. They say that the "reasons" for a particular placement must be examined before relief can be granted to class members.

Respondents disagree. The reasons for individual class member's placements need not be examined under current federal law, see supra at 25, and, even if the reasons for each class member's placement should be examined, such reasons were fully and adequately examined as the IEP was developed. Thus a child residentially placed under an IEP is "educationally placed" even under Petitioners' approach.

The district court and the Seventh Circuit recognized that Petitioner's demand is futile. The members of the class whose IEP's call for a residential placement are the same developmentally disabled children whose placement in residential facilities is necessary for their education. As Petitioners appear to acknowledge, the IEP does not specify particular "reasons" for placement. Petition for Certiorari, at 7, n. 1. The existence of an IEP which calls

for residential placement means that that placement is necessary for the child's education. In all such cases, free residential schooling is required under 34 C.F.R. § 300.401, which provides:

> "Each state educational agency shall insure that a handicapped child who is placed in ... a private school or facility by a public agency:
>
> (a) Is provided special education and related services:
>
> (1) In conformance with an [IEP]...;
>
> (2) At no cost to the parents...."

II. THE SEVENTH CIRCUIT COURT OF APPEALS DECISION IS NOT IN CONFLICT WITH BOARD OF EDUCATION V. ROWLEY.

Petitioners' citation of Board of Education v. Rowley, 458 U.S. 176 (1982), adds little to their analysis. In Rowley, this Court held that the EHA, consistent with its roots in case law under the equal protection clause of the fourteenth amendment to the United States Constitution,

requires "meaningful access" to educational services for the handicapped, rather than any enhanced level of educational quality where useful services are being provided. Id. at 198. Thus a deaf girl who could progress easily from grade to grade in regular classes with a hearing aid and other supplementary benefits was not entitled, in addition, to the full time services of a sign language interpreter. Id. at 210.

There is no conflict between the decision in the instant case and that in Rowley, much less a conflict on an important issue within the meaning of Supreme Court. Rule 17(1)(c). Rowley acknowledges that the EHA requires residential placement of some children, id. at 181, n. 4, just as it recognizes that the local or state education agency's determinatio of just what the Act requires for each child is found in the services called

for on the Individualized Education Program, id. at 203-204. Rowley's focus on whether the services at issue are needed for the child to learn is completely consistent with that of the federal regulation that all of the courts in this case have relied on: whether "placement in a public or private residential program is necessary to provide special education and related services to a handicapped child . . ." (emphasis added). If so, "the program, including nonmedical care and room and board, must be at no cost to the parents of the child." 34 C.F.R. § 300.302.

By developing IEP's that call for residential placement for each child in the class, as well as by conceding that each child in the class has been residentially placed for reasons of developmental disability, the Petitioners have acknowledged that residential schooling is necessary to provide special educa-

tion and related services. With Lester Parks as with the other children placed by the same agency for the same reasons, "[t]he EHA will not countenance defendants' decision to accede to Lester's placement at Willowglen as long as they need not fully fund it." Parks v. Pavkovic, 557 F. Supp. 1280, 1285, Appendix at B-8. On the contrary, as Rowley states, the EHA requires that needed "instruction and services be provided at public expense." 458 U.S. at 189. As this Court's most recent case interpreting the EHA makes clear, "The Act was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives." Burlington School Committee v. Department of Education, 53 U.S. L.W. 4509, 4513 (U.S. 1985).

III. THE OTHER CONSIDERATIONS OF SUPREME COURT RULE 17 COUNSEL AGAINST REVIEW.

Far from being a situation in which the Seventh Circuit Court of Appeals decision is contrary to a decision of a high state court, the Seventh Circuit opinion is perfectly consistent with decisions of the Illinois state courts in the same case. All state and federal courts which have considered the issue have held, without dissent, that the State of Illinois violated the EHA by charging responsible relative liability to children placed in residential placements pursuant to an IEP. See S.Ct. Rule 17(1)(a) and (b). Cf. Forsyth v. Hammond, 166 U.S. 506 (1897) (grant of certiorari where conflict existed between federal court and courts of state where federal court was located). The Illinois Supreme Court refused to review the Appellate Court's decision that Illinois acted

unlawfully in charging responsible relative liability for Lester Parks.[3/]

Furthermore, to the extent that Petitioners are challenging the district court's definition of the class (which was affirmed by the Seventh Circuit), this Court has expressed a justifiable reluctance to review class definitions, an area in which district courts have wide discretion. See Califano v. Yamasaki, 442 U.S. 682, 702-03 (1979).

[3/]A federal administrative determination is also in accord. The United States Department of Education Office of Civil Rights has issued a letter finding that it violates regulations that incorporate the EHA regulations to fail to pay responsible relative liability for handicapped students in Chicago. Ruth B. Love, 3 E.H.L.R. (CRR) 257.448 (March 11, 1983)

IV. THE SEVENTH CIRCUIT COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S FINDING THAT THE STATE OF ILLINOIS ACTED UNLAWFULLY BY CHARGING RESPONSIBLE RELATIVE LIABILITY TO DEVELOPMENTALLY DISABLED CHILDREN RESIDENTIALLY PLACED PURSUANT TO AN IEP.

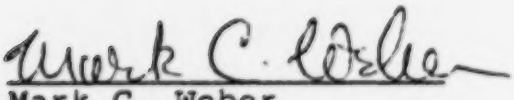
The EHA requires that a free appropriate public education be provided to all handicapped children. The State of Illinois was not providing a free appropriate public education when it required parents whose children were classed as "developmentally disabled" to pay up to $100 per month for the residential placement of their children, even though, as Petitioners all but concede, those placements were necessary for the children to learn. The class of children who receive relief under the lower courts' decisions are those whose placements were necessitated by their developmental disability, children who, because of mental retardation and similar afflictions, cannot satisfactorily

be educated at home. Parks, 753 F.2d at 1406, Appendix at A-13. Moreover, the only children in the class are those whose residential placements are called for by their IEP's. The IEP's purpose is to state what the school district or other public agency acknowledges that the EHA requires for a particular child so that that child may be educated. Petitioners deny the importance of the IEP in an attempt to persuade this Court that they need not provide a free appropriate public education for a certain class of handicapped children. Petitioners' attempt is in direct contravention of the EHA, federal regulations and state and federal court decisions. Therefore, the decision of the Seventh Circuit is correct in all aspects challenged by Petitioners.

CONCLUSION

For the foregoing reasons, the Respondents submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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20 U.S.C. § 1412

Eligibility requirements

In order to qualify for assistance under this part in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 613(b) in effect prior to the date of the enactment of the Education for All Handicapped Children Act of 1975 and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that --

. . .

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of three

and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

. . .

20 U.S.C. § 1415

Procedural safeguards

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection

(c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

34 C.F.R. § 300.2

Applicability to State, local and private agencies.

(a) States. This part applies to each State which receives payments

under Part B of the Education of the Handicapped Act.

(b) Public agencies within the State. The annual program plan is submitted by the State educational agency on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of handicapped children. These would include:

(1) The State educational agency, (2) local educational agencies and intermediate educational units, (3) other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf or blind), and (4) State correctional facilities.

(c) Private schools and facilities. Each public agency in State is responsible for insuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

(20 U.S.C. 1412(1), (6); 1413(a); 1413(a)(4)(B)

Comment. The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

34 C.F.R. §300.302

Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(20 U.S.C. 1412(2)(B); 1413(a)(4)(B)

Comment. This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind.

34 C.F.R. § 300.401

Responsibility of State educational agency.

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:

(1) In conformance with an individualized education program which meets the requirements under §§300.340-300.349 of Subpart C;

(2) At no cost to the parents; and

(3) At a school of facility which meets the standards that apply

to State and local educational agencies (including the requirements in this part); and

(b) Has all of the rights of a handicapped child who is served by a public agency.